LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC., and PATRICK HAMILTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS.

JOSEPH P. LOEB,
HERMAN F. SELVIN,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Respondents.

LOEB AND LOEB,
Of Counsel.

SUBJECT INDEX

PAGE

Restatement of question presented 1

Supplementation of petitioners' statement of the case 2

Summary of the argument 6

Argument 9

I.

Neither the supposed necessity for appropriation of copyrighted material by parodists nor the purpose of promoting the progress of science and the useful arts requires destruction or dissipation of the exclusive rights secured by copyright 9

A. Parody does not need appropriation of substantial copyrighted material. It may live as it has in the past by only such appropriations as are open to all authors 9

B. The policy imported by the copyright clause of the Constitution enjoins preservation rather than destruction of the exclusive rights secured by copyright; for that clause seeks to bring about the progress of science and the useful arts through the means of securing to authors the exclusive right to the profits and rewards of their labors 20

II.

Petitioners' appropriation of substantial copyrightable material for their own commercial purposes cannot be justified as a fair use of respondents' copyrighted dramatic work 27

A. An unauthorized taking of substantial copyrightable material is not fair use 29

B. Petitioners' use of respondents' material was not for purposes of review or criticism but for the purpose of commercial advertising. Such a use is not fair 35

PAGE

C. Petitioners' use was injurious to respondents. An injurious use cannot be a fair use..... 40

D. A parody or burlesque is no exception to the general rule of unfair use..... 43

III.

A custom to burlesque, even if shown to have existed in the breadth claimed, cannot change the legal effect of the copyright act or the rules of law applicable to the case..... 50

Conclusion 52

Appendices:

Appendix "A." Petitioners' television play (2d Ed.) with material taken from respondents' photoplay deleted..App. p. 1

Appendix "B." Petitioner's television play (2d Ed.) with material supplied by them deleted.....App. p. 9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Adamson v. Gilliland, 242 U. S. 350	34
Ager v. Peninsular etc. Navig. Co., 26 Ch. D. 637	36
American Inst. of Arch. v. Feinchel, 41 F. Supp. 146	35
American Tobacco Co. v. Werckmeister, 207 U. S. 284	26
Anschl v. Puritan Phar. Co., 61 F. 2d 131, cert. den. 287 U. S. 666	27, 36
Associated Music Publishers v. Debs Memorial Radio Fund, 141 F. 2d 852, cert. den. 323 U. S. 766	33, 36, 37
Avedon v. Exstein, 141 F. Supp. 278	51
Baker v. Selden, 101 U. S. 99	12
Bell v. Whitehead, 8 L. J. N. S. 141	38, 39
Bleistein v. Donaldson Lithog. Co., 188 U. S. 239	17
Bloom v. Hamlin & Nixon, 125 Fed. 977	43, 49
Bohn v. Bogue (Eng., 1846), 7 L. T. (o. s.) 277	38
Bradbury v. Hotten (Eng., 1872), L. R. 8 Ex. 1	41
Brightley v. Littleton, 37 Fed. 103	35
Burrow-Giles Litho. Co. v. Sarony, 111 U. S. 53	23
Burtis v. Universal Pictures Corp., 40 Cal. 2d 823, 256 P. 2d 933	12
Caliga v. Inter Ocean Newspaper, 215 U. S. 182	24
Callaghan v. Myers, 128 U. S. 617	35
Campbell v. Scott, 113 Sim. 31, 59 Eng. Rep. 784 (1842)	4, 32, 38
Carlton v. Mortimer (Eng.), Copyright Cases, 1917-23, p. 194	47
Chapman v. Ferry, 18 Fed. 539	35
Chatterton v. Cave, 3 App. Cas. 483 (Eng., 1878)	11, 30, 38
Clyde Equipment Co. v. Fiorito, 16 F. 2d 106	37
Coleman v. Wather, 5 T. R. 245, 101 Eng. Rep. 137 (1793)	16
Columbia Pictures Corp. v. National Broadcasting Co., 137 Fed. Supp. 348	13

PAGE

Conde Nast Publics. v. Vogue School, 105 F. Supp. 325 36
De Acosta v. Brown, 146 F. 2d 410 ..... 33, 34
Dellar v. Goldwyn, 150 F. 2d 612, cert. den. 327 U. S. 790 12
Donaldson v. Becket (1774), 4 Burr. 2408, 2 Bro. 129, 1 Eng. Rep. 837, 98 Eng. Rep. 257 ..... 21, 24
Dymow v. Bolton, 11 F. 2d 612, cert. den. 327 U. S. 790 12
Falk v. Donaldson, 57 Fed. 32 40
Farmer v. Elster, 33 Fed. 494 33
Fashion Originators Guild v. Federal Trade Comm., 114 F. 2d 80, aff'd 312 U. S. 457 24
Fendler v. Morosco, 253 N. Y. 281, 171 N. E. 56 12
Ferris v. Frohaman, 223 U. S. 424 16
Fleischer Studios v. Ralph A. Freunlich, 73 F. 2d 276, cert. den. 294 U. S. 717 17
Folsom v. Marsh, 5 C. C. Mass., 9 Fed. Cas. 342 ..... 4, 31, 38, 41
Fox Film Corp. v. Doyal, 286 U. S. 123 ..... 26, 40
Francis, Day & Hunter v. Feldman & Co., [1914] 2 Ch. D. 728 .. 46
D. 728 46
Gilmore v. Anderson, 38 Fed. 846 33
Glyn v. Western Features Film Co., Ltd. [1916] 1 Ch. 261 ..... 45, 49
Green v. Luby, 177 Fed. 287 43
Green v. Minzenheimer, 177 Fed. 286 43
Greene v. Bishop (C. C. Mass., 1858), 10 Fed. Cas. 1128 41
H. Blacklock v. C. Arthur Pearson, Ltd. [1915] 2 Ch. 376 32
Hanfstaengl v. Empire Palace [1894] 2 Ch. 1 46
Hanfstaegel v. Empire Palace [1894] 3 Ch. 109 46
Harold Lloyd Corp. v. Witwer, 65 F. 2d 1 12
Hartford Print. Co. v. Hartford Direc., etc., Co., 146 Fed. 332 40
Hawkes & Son v. Paramount Film Service (Eng., 1934) Ch. 605 ..... 30, 32

PAGE

Henry Holt & Co. v. Liggett & Myers Tob. Co., 23 F. Supp. 303 ..... 33, 36, 40

Hill v. Whalen & Martell, 220 Fed. 359 ..... 28, 38, 41, 42, 43, 44, 49

Holmes v. Hurst, 174 U. S. 82 12

International News Service v. Associated Press, 248 U. S. 215 42

Jarrould v. Houlston (1857), 3 K. & J. 708, 69 Eng. Rep. 1294 35

Johns v. Johns P. Co. v. Paull, etc., Corp., 102 F. 2d 283 40

Johnstone v. Bernard Jones Publ[illegible]. [1938] 2 All E. R. 37 ..... 32, 38

Karll v. Curtis Pub. Co., 39 F. Supp. 836 ..... 35, 41

Kelly v. Morris (Eng., 1866), L. R. 1 Eq. 697 35

King Features Syndicate v. Fleischer, 299 Fed. 533 ..... 17, 28

Laurence v. Dana (C. C. Mass., 1869), 15 Fed. Cas. 26 ..... 28, 31, 41

Leon v. Pacific Tel. & Tel. Co., 91 F. 2d 486 ..... 29, 33, 31, 40

Lewis v. Fullerton (1839), 2 Beav. 6, 48 Eng. Rep. 1080 32

Loew's Inc. v. Superior Court, 18 Cal. 2d 419, 115 P. 2d 983 24

M. Whitmark & Sons v. Pastime Amuse. Co., 298 Fed. 470 31

MacDonald v. DuMaurier, 144 F. 2d 696 34

MacMillan Co. v. King, 223 Fed. 862 ..... 33, 40

Mathews Conveyer Co. v. Palmer-Bee Co., 135 F. 2d 73 ..... 31, 41

Mazer v. Stein, 347 U. S. 201 ..... 12, 17, 20, 24, 28

Meccano, Ltd. v. Wagner, 234 Fed. 912 31

Metro-Goldwyn Pictures Corp. v. Sheldon, 298 U. S. 669 13

Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 ..... 13, 21, 25

National Comics v. Fawcett Publications, 191 F. 2d 594 28

National Institute v. Nutt, 28 F. 2d 132 31

New York Tribune v. Otis & Co., 39 F. Supp. 67 ..... 31, 36, 38, 41

Nichols v. Universal Pictures Co., 45 F. 2d 119, cert. den. 282 U. S. 902 ..... 11, 13, 29

Nutt v. National Institute, 31 F. 2d 236 ..... 27, 28, 32

Reade v. Conquest, 9 C. B. (N. S.) 755, 142 Eng. Rep. 297 (1861) 16

PAGE

Reed v. Holliday, 19 Fed. 325 ..... 33, 40
Roworth v. Wilkes (1807), 170 Eng. Rep. 889 38
Sampson & Murdoch Co. v. Seaver-Radford Co., 140 Fed. 539 ..... 35, 41
Sayers v. Spaeth, (S. D. N. Y., 1932), Cop. Off. Bull. No. 20, 625, 626 38
Sayre v. Moore (1785), 1 East. 361 n., 39 Eng. Rep. 139 n. 18
Scott v. Stanford, L. R. 3 Eq. 718, (Eng., 1867) 4, 31, 38
Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49, cert. den. sub nom. 13, 27, 28, 30, 34
Sheldon v. Metro-Goldwyn Pictures Corp., 106 F. 2d 45, affd 309 U. S. 390 27
Shipman v. R.K.O. Radio Pictures, 100 F. 2d 533 13
Simms v. Stanton, 75 Fed. 6 ..... 32, 41
Smith v. Chatto (1874), 31 L. T. N. S. 775 ..... 32, 38
Stein v. Mazer, 204 F. 2d 472, aff'd sub nom. 28
Story v. Holcombe, (C. C. Oh., 1847) 23 Fed. Cas. 171 ..... 14, 31, 34, 38, 41
Stowe v. Thomas (C. C. Pa., 1853), 23 Fed. Cas. 201 14
Toksvig v. Bruce Pub. Co., 181 F. 2d 664 ..... 33, 36
Towle v. Ross, 32 F. Supp. 125 ..... 30, 33, 35
Triangle Conduit etc., Co. v. Fed. Trade Comm., 168 F. 2d 175 37
Twentieth Century-Fox Corp. v. Dieckhaus, 153 F. 2d 893 12
United States v. Borden Co., 308 U. S. 188 17
United States v. Dodson, 268 Fed. 397 51
United States v. National Ass'n, 339 U. S. 485 34
United States v. Pine River Logging etc. Co., 89 Fed. 907 51
United States v. Yellow Cab Co., 338 U. S. 338 34
Universal Pictures Co. v. Harold Lloyd Corp., 162 F. 2d 354 ..... 27, 28, 33, 34, 41

PAGE

University of London Press v. University Tutorial Press [1916] 2 Ch. 601 38
W. H. Anderson Co. v. Baldwin, 27 F. 2d 82 41
Walter v. Steinkopff [1892] 3 Ch. 489 ..... 36, 39, 50
Warner Bros. Pictures v. Columbia Broadcasting System, 102 F. Supp. 141 30
Warren v. White, etc., Mfg. Co., 39 F. 2d 922 40
Washingtonian Pub. Co. v. Pearson, 306 U. S. 30 17
Webb v. Powers (C. C. Mass., 1847), 29 Fed. Cas. 511 35
West Pub. Co. v. Edward Thompson, 169 Fed. 833, aff'd 176 Fed. 833 ..... 30, 35
Wetherby & Sons v. International Horse etc. Exch. (1910), 2 Ch. 297 (Eng.) 29, 32, 40, 41
Wheaton v. Peters, 8 Pet. 590 (1834) 24
White-Smith Music Co. v. Apollo Co., 209 U. S. 1 19
Wilkins v. Aikin (1810), 17 Ves. 422, 34 Eng. Rep. 163 30
Wittingham v. Wooler (1817), 2 Swans. 428, 36 Eng. Rep. 679 39

RULES

Federal Rules of Civil Procedure, Rule 52(a) 6

STATUTES

Act of August 18, 1856 (11 Stat. 138, Chap. 169) 16
Connecticut Act of January 8, 1783, p. 22 24
Copyright Laws, 4, 8, 9, 17, 19 23
Copyright Laws 5 (Md.), 6 (N. J.), 10 (Pa.), 15 (N. C.) 23
Copyright Laws 1783-1952 (Copyright Office, 1953) 22
1 and 2 George V, Chap. 46, Sec. 2(1), Subs. (i) 32
United States Code, Title 17, Sec. 1(a)(c)(d) 27
United States Constitution, Art. I, Sec. 8 ..... 18, 20
5 and 6 Victoria (1842), Chap. 45 16

MISCELLANEOUS — PAGE

1 Cambridge History of English Literature, pp. 314, 354 15
Clarke, Copyright & Industrial Design (1951), pp. 63, 83 49
Copinger & Skone James, Law of Copyright (8th Ed., 1948), p. 129, 131-132 48
13 Corpus Juris, pp. 1113, 1118 49
5 Eliot, Debates on the Federal Constitution, pp. 439-440 25
5 Eliot, Debates on the Federal Constitution (1928), pp. 510-512 26
4 Encyclopedia Brittanica (1957), p. 413 15
17 Encyclopedia Brittanica (1957), p. 333 (by Edmund G. V. Knox, Editor, Punch, 1932-49) 13
8 Halsbury's Laws of England (3d Ed., Lord Simonds, 1954), Sec. 786, p. 433 32
8 Halsbury's Laws of England (3d Ed., Lord Simonds, 1954), Sec. 786, p. 433, note (d) 46, 47
Holmes-Pollock Letters (Howe Ed., 1941), p. 53 19
House Report No. 2222, 60th Cong., 2d Sess., pp. 1, 3, 6 ..... 17, 26
House Report No. 2222, 60th Cong., 2d Sess., p. 2 22
24 Journals of the Continental Congress, p. 180 (Govt. Print. Office) 21
24 Journals of the Continental Congress, pp. 211, 326 22
Kitchin, Survey of Burlesque and Parody in English (Oliver & Boyd, 1931), p. 9 15
Kitchin, Survey of Burlesque and Parody in English (Oliver & Boyd, 1931), p. 167 13
Life, May 7, 1957, p. 53 14
Shepperson, The Novel in Motley (1936), p. 11 14
Stone, Parody (Martin Secker, London), pp. 24, 38 13
2 Story, Commentaries on the Constitution of the United States (5th Ed.), Sec. 1152, p. 83 23
2 Story, Commentaries on the Constitution of the United States (5th Ed.), Sec. 1152, p. 84 25

PAGE

The Federalist, No. XLIII (Madison) 21, 26

Warren, The Making of the Constitution (1928), p. 625, n. 1 25

Weil, American Copyright Law (1917), Secs. 173-174, pp. 73-74 14

Weil, American Copyright Law (1917), Sec. 1156, p. 439 31

Wells, Parody Anthology (1904), p. xxv 13

3 Williston, Contracts (Rev. Ed.), 1879, Sec. 651 51

IN THE

Supreme Court of the United States

October Term, 1957.

No. 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC., and PATRICK HAMILTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS.

Restatement of Question Presented.

The District Court found, and the Court of Appeals concurred in the finding, that petitioners copied substantial parts of the copyrightable and copyrighted material in respondents' motion picture photoplay into a filmed television play. Petitioners intended to televise, and but for the injunction herein would have televised that play nationally as part of a program advertising Lucky Strike cigarettes. Was it error, on those facts, to find and conclude that such copying was not a fair, but was an infringing, use of respondents' copyrighted material notwithstanding that

petitioners' play was in form a burlesqued presentation of respondents' photoplay?[1]

Supplementation of Petitioners' Statement of the Case.

Petitioners' statement of the case [Br., 3-6[2]] is substantially accurate. It needs, for completeness, some supplementation; and, for the sake of convenience, a summary of the District Court's material findings of fact in which the Court of Appeals concurred.

1. The petitioners are, and for a good many years have been, engaged jointly in a commercial enterprise—the advertising of Lucky Strike cigarettes over radio and television. [R. 56-57, 62.] To be effective their advertising campaign needs, of course, an audience to be subjected to the advertising message. That audience, in television advertising, is attracted by the presentation of entertainment programs which may be received and enjoyed in the viewers' homes. The advertising message or "commercial" is interpolated on several occasions during the presentation of the entertainment. Petitioner Benny

[1] Petitioners' statement of the question would make the holding below appear to have been that the so-called doctrine of fair use is never applicable to parody or burlesque. Neither lower court so held. What was held was that petitioners' use of respondents' copyrighted material, being qualitatively substantial and for competitive and commercial purposes, went beyond that permitted by the doctrine. So far as parody as such was concerned, the parodist, it was held, had the same right of fair use as any other author, but no greater right. [R. 232, 235-236, 240, 251-252, 282-284.] The question here, then, is not whether parody *may* be a fair use; no doubt in appropriate cases it may be. The question, rather, is whether, in the circumstances of this case, it *was* a fair use. That was a question of fact, resolved, on ample evidence, against the petitioners.

[2] The Brief of Petitioner is referred to herein by the abbreviation "Br."

"is recognized as one of the most highly expert performers in many fields of comedy." [R. 57.] He supplies the entertainment part of the Lucky Strike advertising program. [R. 56.] Petitioner CBS is a nationally known radio and television network whose programs are broadcast and telecast throughout the United States. It supplies the facilities and the air time for televising the Lucky Strike program. [R. 49, 62.] Petitioner American Tobacco Co. manufactures Lucky Strike cigarettes. [R. 49.] It sponsors the program and its products are advertised on it. [R. 56.] The infringing play "Auto Light" was prepared for presentation, and but for the injunction herein would have been presented, as one of the programs so designed to advertise Lucky Strikes. [R. 67-68, 69.]

2. An almost identical play, copied from respondents' copyrighted photoplay, had been presented several years before by Benny and American as a radio play over another network. [R. 62-63.] This was done in circumstances which impelled the District Court to find that it had been done with Loew's consent to that single performance. [R. 63-64, 80.]

3. On the occasion of the presentation by petitioners of their first television version of respondents' photoplay Loew's did more than merely inform CBS "that it had exclusive rights to the production of 'Gas Light' . . ." [Br. 4.] It asserted that petitioners' use of material from "Gas Light" in their television play was an infringement of its copyright; and that it would enforce its rights in the premises. [R. 66-67.] Thus, when petitioners essayed their second television attempt along these same lines, they were embarking upon a course of action which they knew was claimed by Loew's to be, and which might well

turn out to be, as it did, an infringement of Loew's copyright.[3]

4. When that which was appropriated from Gaslight is deleted from petitioners' play, nothing is left save a few disconnected and even incoherent "gags" or comic antics, telling no story and making no point. [Appendix "A", *infra.*] On the other hand, when the material which was added to the television play by petitioners is deleted, what is left tells in condensed form the essential story of "Gas Light" in the same way, with the same sequence of events and incidents as are found in the photoplay. [Appendix "B", *infra.* And, see, summary of the photoplay in the opinion of the Court of Appeals, R. 278-279.]

5. The essential findings of fact were to this effect:

a. The photoplay "Gas Light" was an original work, duly copyrighted. [R. 79-80.]

b. In October, 1945, Benny caused a radio play to be written by writers in his employ, which was copied in substantial part from "Gas Light." It was publicly performed over radio, as part of a program, sponsored by American, advertising its products. That performance was with Loew's permission which did not, however, extend beyond that specific performance. [R. 80.]

c. In January, 1952, the petitioners, without respondents' knowledge or permission, caused a tele-

---

[3] In the face of these facts the denial by petitioners of any *animus furandi* sounds somewhat hollow. [See, *Campbell v. Scott*, 11 Sim. 31, 38, 59 Eng. Rep. 784; 787 (1842); *Scott v. Stanford*, L. R. 3 Eq. 718, 723 (1867); *Folsom v. Marsh*, 5 C. C. Mass., 9 Fed. Cas. (#4901) 342, 349 (1841).]

vision play to be written. It was copied in substantial part from the photoplay "Gas Light." The part so copied was a substantial part of the television play and of the copyrightable and copyrighted material in the photoplay. The television play was televised for profit by petitioners throughout the United States as part of a program advertising American's tobacco products. [R. 80-81.] Loew's informed CBS promptly that it considered this copying of its photoplay to be an infringement of its copyright. [R. 82.]

d. The program was reproduced on film, by means of which petitioners will be enabled to perform and exhibit it publicly on television, in motion picture theatres, or in any other places and before any other audiences in and before which motion pictures may or can be projected and exhibited. [R. 81.]

e. In May, 1953, CBS commenced the preparation of a motion picture entitled "Auto Light." It was designed and intended to be a remake of the earlier television play, to be publicly exhibited on television throughout the United States as part of a program starring Benny, sponsored by American, and advertising the latter's products. It, too, was reproduced on motion picture film. [R. 82, 83-84.] On learning of this plan, Loew's promptly notified petitioners that any repeat performance or remake of the earlier television play would be an infringement of its copyright in "Gas Light." [R. 82-83.] But for the injunction herein, this remake would have been publicly televised as and for the purpose planned. [R. 83-84.]

f. The second television play was copied in substantial part from "Gas Light" without petitioners' consent or license. The part so copied was a substantial part of the play and of the copyrightable and copyrighted material in the photoplay. [R. 84.]

g. Petitioners' use of respondents' copyright material was not a fair use thereof; nor was it made fair by reason of the fact that the material was used by way of burlesque or parody. [R. 85.]

Except as petitioners' argument may amount to an attack on the finding of unfair use last summarized, none of these findings was ever challenged below as unsupported by the evidence or as being "clearly erroneous." [See, F. R. C. P., rule 52(a).] All of them were concurred in by the Court of Appeals. [R. 281-282, 284.]

Summary of the Argument.

Without a copyright statute the rights of an author in his work do not survive its first publication. The rights secured by copyright are exclusive in nature and persist after publication for the term of copyright. These rights were designedly so fashioned in order to secure to authors, for limited times, all of the profit and reward which could be realized from their labors, thus giving them an incentive to publish and disseminate their works. This economic philosophy, which underlies the entire concept of copyright, cannot be ignored; nor can it be dissipated by destroying or relaxing the exclusivity of the rights granted.

It is not necessary, in order that parody or burlesque may continue to exist, to give parodists a broader privilege

of appropriating material from copyrighted works than authors generally have. The art is no more important than any of the other literary arts whose practitioners must respect the exclusive rights secured by copyright. Parody is not always or even mainly a slavish copy of some specific work. It is more often than not a burlesque of schools of thought, of style, of ideas, attitudes and causes, to the use of which copyright has never been a bar. Even when it is a lampoon of a specific work, those elements of the original—*i.e.* its ideas and intellectual conceptions, its theme, outline or plot—which are not protected by copyright, furnish ample material for fashioning a recognizable tie between the original and the parody. There is, therefore, no practical necessity for narrowing the exclusive rights secured by copyright in order to permit the parodist to function. Even if it were otherwise, the question of how far authors should be secured in the exclusive right to their writings in order to promote the progress of science and the useful arts is one of policy committed by the Constitution to Congress. The statute which has determined this policy makes no exception in favor of parodists. That statutory policy and the rule of law which embodies it cannot be changed by custom or usage.

The so-called doctrine of fair use is not a means of avoiding the exclusivity of copyright. It has never been extended to cover and immunize a taking of substantial copyrightable material for the purpose of earning a profit therefrom. It is, in fact, only a succinct way of referring to the proposition that unless the appropriation is sub-

stantial and of copyrightable material there is no infringement of copyright. In the instant case the taking was of substantial copyrightable material. That material was taken to serve petitioners' own commercial purpose—to advertise Lucky Strike cigarettes. It was taken for use in an entertainment medium which strongly competes with the motion picture business of the respondent copyright owner. And its use by petitioners forestalls respondents' exclusive right to remake their own play in any form or version including a comic one. Such a taking and use cannot properly be characterized as "fair."

Parody or burlesque stands on no different footing as respects "fair use." Parodists may take from other works to the same extent as other authors; but their privilege in this respect is no greater. To decide the contrary would require giving to parodists a preferred position over all other authors; and it would, under the guise of construction, make a non-exclusive right out of one which Congress, pursuant to the mandate of the Constitution, has expressly declared to be exclusive.

ARGUMENT.

I.

Neither the Supposed Necessity for Appropriation of Copyrighted Material by Parodists nor the Purpose of Promoting the Progress of Science and the Useful Arts Requires Destruction or Dissipation of the Exclusive Rights Secured by Copyright.

Permeating and coloring all of petitioners' argument are two basic propositions. The first of these is that parody cannot live except by feeding upon the meat of earlier works; so that if, by chance, these earlier works are protected by copyright the exclusive rights thereby secured cannot stand in the way of substantial appropriation. [Br. 9-11, 27-35.] The second of petitioners' postulates is that the copyright power was given Congress to "promote the Progress of Science and useful Arts," so that the copyright statutes must be interpreted in a way which will not prevent appropriation of copyrighted material by the practitioner of the parodist's art. [Br. 11-21.] Neither of these propositions will withstand critical analysis, as we propose to show.

A. Parody Does Not Need Appropriation of Substantial Copyrighted Material. It May Live as It Has in the Past By Only Such Appropriations as Are Open to All Authors.

We may lay on one side, for the moment, the question whether, even assuming petitioners' premise of necessity to be true, the conclusion sought to be derived therefrom can be accepted in the face of a statute granting *exclusive* rights in copyrighted material. [See, pp. 17 (n. 12), 27-

28, *infra*.] The fact is that the premise is not true. Parody as that art has been generally practiced, does not parallel the original which it takes off. It does not need, and seldom uses, substantial copyrightable material from the works of others. It can continue to live, as successfully as it has in the past, by the use of that which, even in a copyrighted work, is open to all to take.

For support of these assertions we need not go beyond the testimony of Dr. Baxter—petitioners' expert witness, to whose "beguiling dissertation" on parody the Court of Appeals referred. [R. 284.] Dr. Baxter summarized his views on the matter in this revealing and significant passage of his testimony [R. 156][4]:

> "Mr. Mitchell, I think that is a very excellent synonym for burlesque, take-off from something. It does not parallel in the sense that it just recreates the thing in a new tone, but it takes off from it, selectively, this element, this element, this element, in order to identify this is a burlesque that B is making of A, but it takes off into the blue with all sorts of things. It introduces extraneous materials; it takes one little detail and puffs it up beyond its significance in the original. It leaves out much, but it constantly comes back, so to speak, to refresh itself to the original, and then takes off again. But in no sense parallels the original."

---

[4]The excerpt quoted was Dr. Baxter's summation of the point of his testimony at large. He had earlier testified as follows: ". . . Parody, as I see it, is the taking off of something . . . [it] calls attention to the form. . . . [R. 114.] "But like all burlesques, they tie in recognizably to the drift of the play they burlesque . . . ." [R. 131.] ". . . you take the thing and you take off from it . . . ." [R. 132.] "It isn't complete, it doesn't follow completely the whole chain, but enough. That is the way of burlesque. It ties in this event and another and is recognizable from the original, because it has enough points in common. It

For that kind of take-off, substantial copying of *copyrightable* material is wholly unnecessary. That is so because in every copyrighted work, even during the copyright term, there is some part that goes into the public domain. [*Nichols v. Universal Pictures Co.*, 2 Cir., 45 F. 2d 119, 121, 122 (1930), *cert. den.* 282 U. S. 902.] That part is its theme, situation, or plot, and its ideas or intellectual conceptions. [Cases cited, n. 5, p. 12, *infra*.] These, as Dr. Baxter testified, are the materials of parody or burlesque. These are the things from which is fashioned that tie to the original which, it is said, is so necessary to exercise of the art. Nothing in the decision of the case at bar has put any restriction on resort to these materials, either in "Gas Light" or in any other copyrighted work.

Dr. Baxter, as examples of the sort of thing he was talking about referred to "The Rehearsal" by the Duke of Buckingham, and "The Critic" by Sheridan. [R. 121, 123-124.] Here, perhaps unwittingly, he gave a perfect illustration of the very point we are now making. This becomes apparent upon a consideration of the following comments on those two works made by Lord Blackburn when *Chatterton v. Cave*, 3 App. Cas. 483, 501 (1878), was decided in the House of Lords:

> ". . . an idea may be taken from a drama and used in forming another without the representation of any part of the first. For example: —I have no

---

doesn't follow the whole thing right through. I know of no burlesque which follows every point in the development of a work." [R. 135.] ". . . What it [burlesque] does take is the idea and then make a new character which is a monstrous joke on the other one. That is the way it has always been in burlesque." [R. 137-139.] ". . . the burlesque makes fun of the situation and the people and the theme . . ." [R. 143.] ". . . It concerns itself with parts, parts which it borrows because it is burlesquing. B is burlesquing A, and there are enough things borrowed to tie in the burlesque with the original." [R. 149.]

doubt that *Sheridan* in composing *'The Critic,'* took the idea from *'The Rehearsal,'* but I think it would be an abuse of language to say that those who represent *'The Critic,'* represent *'The Rehearsal,'* or any part thereof; and if it were left to me to find the fact, I should, without hesitation, find that they did not.

"On the other hand, in composing *'The Trip To Scarborough,' Sheridan* took so much from *'The Relapse,'* that if it were left to me to find the fact, I should find that those who represent *'The Trip To Scarborough,'* do represent parts of *'The Relapse.'"*[5]

A more modern example is the television burlesque by Sid Ceasar—another well known television comedian—of the novel and the motion picture "From Here To Eternity." The original was completely recognizable from the parody. Yet, because Ceasar stuck to those parts of the original which, conformably to ordinary principles of copyright law, were open to appropriation, Judge Carter, only a short time after he had decided the case at bar, held that copyright had not been infringed. There, unlike our case, substantial parts of the *copyrightable*

---

[5]This distinction between what may and may not be lawfully taken from an earlier copyrighted work is now, of course, an accepted part of the law of copyright and literary property. [*E. g., Mazer v. Stein*, 347 U. S. 201, 217-218 (1954); *Holmes v. Hurst*, 174 U. S. 82, 86 (1899); *Baker v. Selden*, 101 U. S. 99, 102-103 (1879); *Dellar v. Goldwyn* (2d Cir., 1945), 150 F. 2d 612, 613, *cert. den.*, 327 U. S. 790; *Dymow v. Bolton* (2d Cir., 1926), 11 F. 2d 612, 613, *cert. den.* 327 U. S. 790; *Harold Lloyd Corp. v. Witwer* (9th Cir., 1933), 65 F. 2d 1, 19-20, 23-27; *Twentieth Century-Fox Corp. v. Dieckhaus* (8th Cir., 1946), 153 F. 2d 893, 898-899; *Fendler v. Morosco*, 253 N. Y. 281, 171 N. E. 56, 60 (1930); *Burtis v. Universal Pictures Corp* (1953), 40 Cal. 2d 823, 831, 835, 256 P. 2d 933, 939, 941.] It is a distinction which draws a line between the idea or intellectual conception and the author's expression of it; a line between the teaching of the work and the arrangement of the words which the author uses to impart that teaching. It is a line which many times may be difficult to draw; but it is a line which must be drawn in

elements of the original had not been taken. [*Columbia Pictures Corp. v. National Broadcasting Co.*, S. D. Cal., 137 Fed. Supp. 348, 350-351, 352-353 (1955).] Had petitioners here similarly confined themselves they would have been able, as parodists always have been, to accomplish their purpose without infringing upon the rights of others.[6]

---

every plagiarism case. Judge Learned Hand has frequently and characteristically made this point. [See, *e. g., Nichols v. Universal Pictures Co., supra,* 45 F. 2d at 119, 121-122; *Sheldon v. Metro-Goldwyn Pictures Corp.* (2d Cir., 1936), 81 F. 2d 49, 54, *cert. den.* sub. nom. *Metro-Goldwyn Pictures Corp. v. Sheldon*, 298 U. S. 669; *Shipman v. R.K.O. Radio Pictures* (2d Cir., 1938), 100 F. 2d 533, 538.]

An early statement of this proposition in England is the following from the judgment of Willes, J., in *Millar v. Taylor*, (1769), 4 Burr. 2303, 2331, 98 Eng. Rep. 201, 216:

> ". . . all the knowledge which can be acquired from the contents of a book is free for every man's use: if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if by reading an epic poem a man learns to make an epic poem; he is at liberty.
>
> ". . . but multiplying copies in print is quite a distinct thing from all the book communicates. And there is no incongruity to reserve that right; and yet convey the free use of all the book teaches."

[6]". . . the target aimed at by the parodist is not always the poet whose dress he wears. Satire of current manners, politics, or morals may be conveyed by using parody. . . ." [17 *Encyc. Brit.* (1957), 333 (by Edmund G. V. Knox, Editor, *Punch*, 1932-49). Carolyn Wells in the Introduction to her *Parody Anthology* (1904) xxv, divides parody into three kinds: "word-rendering," "form-rendering," and "sense-rendering." So does Christopher Stone in *Parody* (Martin Secker, London), 38. With respect to the first of these, which comes the closest to direct copying of a specific work, Stone says: "The verbal parodist either chooses a poem which in style or metre suits a subject about which he is anxious to write humorously; or more commonly he chooses a subject which is suggested by a particular poem which he is anxious to burlesque. . . ." [Stone, *op. cit.*, 24] Kitchin, whom petitioners cite, commenting on Fielding's attempt to parody "*Pamela*" in "*Joseph Andrews*," dismisses it as first-rate parody because "there is no attempt to imitate the style of *Pamela* and style, we think, is of the essence of true parody. . . ." [Kitchin, *Survey of Burlesque and Parody in English* (Oliver & Boyd 1931), 167.]

The truth is, as Dr. Baxter's testimony demonstrates, and as a knowledge of the *genre* will confirm, parody seldom if ever parallels the original line-by-line or scene-by-scene.[7] It is not even always a parody of some specific work. It is more frequently than not a lampoon of ideas, of form and style, of schools of thought or philosophy, of social, political or intellectual attitudes and causes.[8] To

---

[7]Of course, over the past thousand years or more there undoubtedly have been instances of parodies which more or less slavishly followed the original. We do not know why these instances went unchallenged by the offended authors. Perhaps it was, as Dr. Baxter testified, that parody of one's work is often taken as a sign of success and as a compliment. [R. 144-145, 150.] More likely, it was because, as one of the scholars relied on by petitioners has put it, "The lax copyright laws of the eighteenth century made not only imitation but even plagiarism feasible. . . ." [Shepperson, *The Novel in Motley*, (1936), 11.] In this country it was not until the 1909 revision of the copyright statutes that an abridgment or condensation of a work became an infringing use. [See *Story v. Holcombe*, (C. C. Oh., 1847), 23 Fed. Cas. (#13497) 171 *Stowe v. Thomas* (C. C. Pa., 1853), 23 Fed. Cas. (#13514) 201; Weil, *American Copyright Law* (1917), 73-74, Secs. 173-174.] Most direct parodies no doubt would have been defensible as a "condensation." [See, also, note 11, p. 15, *infra*.] Whatever the reason, the inaction of these others can have no adverse affect on the rights of those who do not acquiesce and, therefore, seek to vindicate their rights. [See, also, the cases at pp. 50-51, *infra*.]

[8]In his serious *apologia* for "The Tale Of A Tub," Swift said:

> ". . . some of those passages in this discourse which appear most liable to objection are what they call parodies, where the author personates the style and manner of other writers, whom he has a mind to expose."

The several prefaces to The Tale are themselves parodies of the then current practice of inserting dedicatory prefaces and of their frequently pompous and obsequious style, but no specific preface is parodied.

A modern and amusing example of a parody which does not depend upon any specific work is the following: [*Life*, May 7, 1957, p. 53]

> "In 1958 the hard 'c' would be replaced by 'k' . . . Not only would this klarify the konfusion in the minds of spellers but typewriters and linotypes kould all be built with one less letter. . . . In the subsequent blaze of publisity, it would be announsed

that type of parody—and it is by far the bulk of it—obviously nothing but the uncopyrightable elements of any specific work or group of works is needed[9].

Before leaving this subject, one other implication of petitioners' argument may be noticed. What they are seeking is not "fair use" as that term is generally understood. What they want is a preferred position over all other literary practitioners—and this, it may be added,

---

that the troublesome 'ph' would henseforth be written 'f.' This would make words like 'fonograf' 20 persent shorter in print.

"By 1959 publik interest in a fonetik alfabet kan be expekted to have reatshed a point where more radikal prosedures are indikated. We would urge at that time the elimination of al double leters whitsh have always been a nuisanse and desided deterent to akurate speling.

"We would al agre that the horible mes of silent 'e's' in our language is disgrasful. Therfor, in 1961, we kould drop thes and kontinu to read and writ merily along as though we wer in an atomik ag of edukation. Since by this time it would be four years sins anywun had used the leter 'c' we would then sugest substituting 'c' for 'th.'

"Kontinuing ces proposals year after year, we would eventuali hav a reaili sensibl writen languag. By 1975 wi ventyur tu sa cer wud bi no mor uv ces teribly trublsum difikultis."

[9]Here, again, we may resort to Dr. Baxter's testimony in which he refers, along these lines, to parodies by Aristophanes, Peele, Beaumont, Shakespeare, Bret Harte, and Donald Ogden Stewart. [R. 118, 120, 121, 169-170.] He also said: "... Burlesque is rarely personal. It doesn't attack individuals, but rather modes, styles, forms, tendencies, or focuses upon one work." [R. 148.] "... burlesque likes to look at style, it likes to look at characterization, at the poetry, at the theme of a work of art." [R. 149.] Dr. Baxter had himself tried his hand at the art. The result, in the style but not the content of *Alice in Wonderland*, was a parody of literary tastes in the 1930s. [R. 184-186.] See, also, n. 6, p. 13, *supra*.

The first of the great English parodies seems to have been Chaucer's *Rime of Sir Thopas*. It was not aimed at any one work but at "the whole family of metrical romances. . . ." [Kitchin, *op. cit.*, 9]; it was "a burlesque of the long-winded mediaeval romances. . . ." [4 Encyc. Brit. (1957) 413.] Chaucer seized upon the defects of the romances—their long-windedness, their lack of a sense of proportion and their aristocratic tone—and made them the basis of his parody of the *genre*. [1 *Cambridge History of English Literature*, 314; 354.]

for the perfectly mundane purpose of being able to attract an audience to whom the virtues of Lucky Strike cigarettes may be broadcast.

Parody does not stand alone as a literary art for which use of some existing original work is necessary. Abridgements or condensations, translations, dramatizations of novels, novelization of dramas, are some other examples. They are as of ancient lineage as parody; certainly they are as well established today.[10] They are as important to the spread of knowledge and the progress of science and the useful arts as parody. Yet no one would for a moment suppose or argue, in the face of the exclusive rights conferred by copyright, that a copyrighted novel, without the author's consent, could be substantially copied or transformed by another into an abridgement or a play or an operetta, or even a comic version of the original.[11]

Actually, the argument for a right of free appropriation could be made in behalf of the conventional literary arts with as much force as it is made here for parody.

---

[10]A glance at any newsstand will show a number of mass-circulation media which consist wholly, or in part, of abridgements of longer current works. For example, there are such magazines, as Reader's Digest, Omnibook, and Science Digest. And one may readily recall, as another example, the abridgement of Sir Winston Churchill's recent works in Life. So, too, many of the now popular paper-backs are abridged editions of the originals. Of course, copyright of the original prevents such a use without consent of the copyright owner. [Cases cited, pp. 27-28, *infra*.]

[11]There was a time when such things could be done, because the scope of statutory copyright was much narrower than it now is. It was, for instance, not until 1842 in England [5 and 6 Vict., c. 45. See, *Colenan v. Wather*, 5 T. R. 245, 101 Eng. Rep. 137 (1793); *Reade v. Conquest*, 9 C. B. (N.S.) 755, 142 Eng. Rep. 297 (1861)], and 1856 in this country that a novelist was given the exclusive right to perform his copyrighted work [Act of August 18, 1856, 11 Stat. 138, c. 169]; and it was much later that he got the sole right to dramatize the work. [Generally, see, *Ferris v. Frohman* (1912), 223 U. S. 424, 432-435.] Until the revision of the copyright stat-

Surely, the novel, the drama, the biography, the history, and all other forms of instructive, or even merely entertaining, writing are at least as important to the spread of knowledge as parody. Yet those who turn their efforts in that direction must respect the exclusivity which copyright confers upon the earlier workers in the same field. What is the reason of social policy or utility which demands that the parodist, but he alone, be allowed a greater freedom to forage in other's preserves?[12]

The notion of exclusive right, for limited times, is implicit in the very concept of copyright. Without it copyright is an ineffective instrument with which to

---

utes in 1909 it was not an infringement of copyright to make, without the author's consent, a bona fide abridgement of a published work. [See cases cited, n. 7, p. 14, *supra*.] All this has been changed, now that we have a copyright statute designed to give to the copyright proprietor the exclusive right "to any lawful use of his property, whereby he may get a profit out of it. . . ." [*King Features Syndicate v. Fleischer* (2d Cir., 1924), 299 Fed. 533, 535-536; *Fleischer Studios v. Ralph A. Freundlich* (2d Cir., 1934), 73 F. 2d 276, 278, *cert. den.* 294 U. S. 717. And, see, *Mazer v. Stein*, *supra*, 347 U. S. at 208-211; *Washingtonian Pub. Co. v. Pearson* (1939), 306 U. S. 30, 36. See, also, note 12, p. 17, *infra*.]

[12]The extent to which, in order to promote progress of science and the arts, the exclusive right of authors should be made something less than exclusive is a determination of policy for the Congress. [*Cf.*, H. Rep. No. 2222, 60th Cong. 2d Sess, 6; *Bleistein v. Donaldson Lithog. Co.*, 188 U. S. 239, 251 (1903).] The Copyright Act of 1909 was adopted after extended hearings at which the views of all interests were put before Congress. [H. Rep. No. 2222, 60th Cong. 2d Sess., 3.] The resulting statute was deliberately designed to enlarge the reach of copyright and to adapt it to modern conditions [H. Rep. No. 2222, 60th Cong., 2d Sess., 1]; in short, to give the copyright owner the right "to any lawful use of his property, whereby he may get a profit out of it. . . ." [*King Features Syndicate v. Fleischer*, *supra*, 299 Fed. at 535-536.] Parody or burlesque, its position and relative importance in the arts, and its inherent needs, were as well known then as they are now. Had it been intended to give parodists a greater freedom of appropriation than that which authors generally would have, "Congress doubtless would have said so." [*Cf.*, *United States v. Borden Co.* (1939), 308 U. S. 188, 201.]

accomplish its social purpose. The great paradox of copyright law is that on the one hand it is desirable that the ideas and discoveries of the ingenious and the learned should be available for the instruction and utilization of all; on the other hand is the hard fact that unless authors can be secured in the right to profit from their works after publication, there will not be the fullest of incentives to create new works, and there will exist a strong deterrent to publishing and generally disseminating those that are created. [Compare Lord Mansfield's comment in *Sayre v. Moore* (1785), 1 East. 361 n., 39 Eng. Rep. 139 n.]

That paradox is solved by the device of copyright: by the notion of an *exclusive* right for a *limited* time. In that way the reward of their ingenuity and labor is secured to authors by giving them a reasonable time in which they, alone, may seek to realize that reward; after that time has elapsed their improvements become the common property of all. That is certainly the solution adopted by our Constitution (Art. I, sec. 8) and the statutes enacted conformably thereto. [See, pp. 20-26, *infra*.]

Once we accept the right of parodists to appropriate at will and without limit from a copyrighted work, an equal right to other authors cannot in logic be refused. Yet in that way lies the destruction of the whole concept of copyright. Petitioners' argument, however attractively it may be dressed, is really an argument against the notion of copyright. Whatever may be said *a priori* for such a point of view, acceptance of it is forestalled. This country is committed by its Constitution to the proposition that copyright, in the sense of an exclusive right for a

limited time, is, if not a necessary, at least a desirable, adjunct of a literate society.[13]

The blunt truth about petitioners' case is that they are seeking, not a fair use, but an advantage which no other class of authors has or can have under existing law. That advantage cannot be justified by any argument of necessity. The necessity which petitioners urge simply does not exist. Parody has never needed, it does not now need, the right to take that which for the "limited times" prescribed by the Constitution and the copyright statutes belong exclusively to another.

---

[13]Compare, Holmes, J., concurring, in *White-Smith Music Co. v. Apollo Co.* (1908), 209 U. S. 1, 19:

> ". . . [Copyright] restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree.
>
> "The ground of this extraordinary right is that the person to which it is given has invented some new collocation of visible or audible points,—of lines, colors, sounds, or words. The restraint is directed against reproducing this collocation, although but for the invention and the statute any one would be free to combine the contents of the dictionary, the elements of the spectrum, or the notes of the gamut in any way that he had the wit to devise. The restriction is confined to the specific form, to the collocation devised, of course, but one would expect that, if it was to be protected at all, that collocation would be protected according to what was its essence. . . ."

The same thought, more briefly and informally stated, is found in a letter of June 26, 1894, to Sir Frederick Pollock. [*Holmes-Pollock Letters* (Howe ed. 1941), 53.]

B. The Policy Imported by the Copyright Clause of the Constitution Enjoins Preservation Rather Than Destruction of the Exclusive Rights Secured by Copyright; for That Clause Seeks to Bring About the Progress of Science and the Useful Arts Through the Means of Securing to Authors the Exclusive Right to the Profits and Rewards of Their Labors.

There is, of course, not the slightest doubt that the copyright power was designed to "promote the progress of science and useful arts . . ." [*U. S. Const.*, art. I, sec. 8.] But of equal importance in the constitutional mandate is the method by which the desired object is to be attained. It is "by securing for limited times to authors . . . the exclusive right to their respective writings . . ." [*Idem.*]

It does not serve the constitutional policy to subvert that method by destroying or dissipating the "exclusive right" which the Congress sought to secure. An appreciation of the contemporary context in which the copyright clause came into being will lead, in fact, to a conclusion just the opposite from that which petitioners draw. The concept of copyright is economically motivated; it is the method which, by giving to the author the profit from his work, is designed to attain the desired promotion of the arts.

This Court has only recently said as much in *Mazer v. Stein, supra*, 347 U. S. at 219:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial

days devoted to such creative activities deserve rewards commensurate with the services rendered."

History, when looked at in slightly more detail than petitioners have seen fit to do, fully supports that view.

First: The comment upon the copyright power made by James Madison, to which petitioners give only passing reference [Br. 14], was this: [*The Federalist*, No. XLIII. (Madison.)]

> "The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged, in Great Britain, to be a right of common law.[14] The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."

This comment takes on pointed significance when the laws passed by the individual states, and the role of Madison and the Continental Congress in that process, are examined.

On March 10, 1783 the Continental Congress appointed a committee, consisting of Madison, Hugh Williamson and Ralph Izard, "to consider the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works." [24 *Journals of the Continental Congress* (Govt. Print. Off.) 180.[15].]

---

[14]Most likely a reference to *Millar v. Taylor* (1769), 4 Burr. 2303, 98 Eng. Rep. 201, and its sequel in the House of Lords, *Donaldson v. Becket* (1774), 4 Burr. 2408, 2 Bro. 129, 1 Eng. Rep. 837, 98 Eng. Rep. 257.

[15]Hereinafter referred to as "*Journals*."

On March 26, 1783, a letter from Joel Barlow "respecting the copyrights of authors", with which was a copy of the Connecticut Act of January 8, 1783, was referred to this committee. [24 *Journals*, 211.]

The Connecticut Act—apparently the first copyright statute in this country,—contained the following preamble [*Copyright Laws* 1783-1952, (Copyright Office, 1953), 1[16]]:

> "Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind . . . ."[17]

On May 2, 1783 the Continental Congress adopted a resolution recommended by the committee to whom the matter of copyright had been referred. The committee reported that it was "persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce . . ." It, therefore, recommended adoption of a resolution requesting the states to enact laws securing authors in the right to their works. [24 *Journals*, 325.]

Within three years of that resolution every state, except Delaware, had done so. [*Copyright Laws*, 4-21.] Each of these laws secured to authors of new works, for

---

[16]Hereinafter referred to as "*Copyright Laws*."

[17]The Connecticut Act, significantly enough, was adopted "at the solicitation of Noah Webster, who desired copyright protection for his spelling book. . . ." [House Rep., No. 2222, 60th Cong., 2d Sess., 2.]

a limited time, the sole and exclusive right of printing, publishing and vending their works. All of them, save two (South Carolina and Virginia), carried a preamble of the same general tenor as the one found in the Connecticut Act—preambles, which plainly expressed the economic philosophy "which lies behind the concept of copyright."[18]

Second: The common law right of authors, with which Madison and, no doubt, his collaborators in the Constitutional Convention were familiar,[19] was a *perpetual*

---

[18]The preamble to the Massachusetts Act, with which the Acts of New Hampshire and Rhode Island were virtually identical, read, in this regard, as follows: [*Copyright Laws*, 4, 8, 9]

"Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of this study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind:

"Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind:"

The preamble to the Georgia Act, also found in almost the identical form in the New York Act, was this: [*Copyright Laws*, 17, 19]

"Whereas the principles of natural equity and justice, require that every author be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings, which may do honor to their country, and service to mankind:"

The other acts similarly placed emphasis on the profit motive as a means of encouraging the publication of books. [*Copyright Laws*, 5 (Maryland), 6 (New Jersey), 10 (Pennsylvania), 15 (North Carolina).]

[19]Story, speaking of the copyright clause, has said that it "was doubtless to this knowledge of the common law and statutable rights of authors and inventors, that we are to attribute this constitutional provision. . . ." [2 Story, *Commentaries on the Constitution of the United States* (5th ed.), 83, sec. 1152.] See, also: *Burrow-Giles Litho. Co. v. Sarony* (1884), 111 U. S. 53, 58.

right so long as the work remained unpublished. Once published, however, and absent a copyright statute, the right was entirely lost and the work became at once available to all for any and every use cared to be made of it. [See, *Wheaton v. Peters*, 8 Pet. 590 (1834), *passim*; *Mazer v. Stein*, *supra*, 347 U. S. at 214-215; *Caliga v. Inter Ocean Newspaper*, 215 U. S. 182, 188 (1909); *Fashion Originators Guild v. Federal Trade Com.*, 2 Cir., 114 F. 2d 80, 83 (1940) *affirmed* 312 U. S. 457; *Loew's Inc. v. Superior Court*, 18 Cal. 2d 419, 421, 115 P. 2d 983, 984-985 (1941); and compare, *Donaldson v. Becket*, *supra*, 2 Bro. at 144-145, 4 Burr. at 2408-2417, 1 Eng. Rep. at 846-847, 98 Eng. Rep. at 258-262.]

Obviously, this state of the law must have been a deterrent to publication and general dissemination of the writings of learned men. Just as obviously, to the extent that works remained unpublished, the benefit to the public, from a knowledge of the information, the ideas and the instruction which they could impart, remained unrealized. What was needed was an incentive, not alone to the creation of new books, but to their general publication and circulation.

Thus we get an insight into what was behind the statement, in the early copyright statutes of the states, of a purpose to "encourage men of learning and genius to publish their writings . . ." [Conn. Act. of Jan. 8, 1783, p. 22, *supra*. See also the equivalent expressions in the other statutes referred to; pp. 22-23, *supra*.] Publication had to be shorn of its right-destroying consequences; otherwise the desire to create and to publish could be nullified by an unwillingness to suffer those con-

sequences.[20] From that purpose springs the device of securing to an author, upon and after publication, his exclusive right. In that way, by increasing publication and consequent dissemination, the progress of science and the useful arts is promoted. Along with that benefit to the public, the ultimate public interest is protected by limiting the exclusive right in time. [See, pp. 17-19, *supra*.]

Third: This was the background against which the copyright clause of the Constitution was framed and enacted. Significantly enough, the suggestion for a copyright power came to the Constitutional Convention from Madison, with whom Charles Pinckney joined. The suggestion of both of them was for a power "to secure to literary authors their copyright for a limited [or, per Pinckney, 'certain'] time . . ." Madison added, by way of method, "to encourage by premiums and provisions, the advancement of useful knowledge and discoveries." [Warren, *The Making Of The Constitution* (1928), 625, n. 1; 5 Eliot, *Debates on the Federal Constitution*, 439-440.] These suggestions resulted in a draft

---

[20]Story, explaining the reason for the copyright power, has said: [2 Story, *Commentaries on the Constitution of the United States* (5th ed.), 84, sec. 1152]

> "... And authors would have little inducement to prepare elaborate works for the public, if their publication was to be at large expense, and, as soon as they were published, there would be an unlimited right of depredation and piracy of their copyright. . . ."

In the judgment of Willes, J., in *Millar v. Taylor*, *supra*, 4 Burr. at 2335, 98 Eng. Rep. at 218, we find this:

> "It is wise in any state, to encourage letters, and the painful researches of learned men. The easiest and most equal way of doing it, is, by securing to them the property of their own works. . . .
>
> "A writer's fame will not be the less, that he has bread, without being under the necessity of prostituting his pen to flattery or party, to get it.
>
> "He who engages in a laborious work, (such, for instance, as Johnson's Dictionary,) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family."

in the form in which it now exists in the Constitution. It was adopted without debate or opposition. [5 Eliot, *op. cit.*, 510-512.]

As Madison's comment in *The Federalist*, page 21, *supra*, shows, the purpose of the clause was well understood. So, too, was the method by which that purpose was to be accomplished. The purpose was "to promote the progress of science and the useful arts." The method —and it is perhaps well to note that it is the only method prescribed—was "by securing for limited times to authors . . . the exclusive right to their respective writings . . ." The economic philosophy behind the method was thus brought to bear upon the social objective to be attained. In any consideration of the scope and meaning of the copyright statutes, and of the exclusive rights which they confer, the economic philosophy of the clause in the Constitution can no more be ignored or blurred than can the ultimate goal which that clause sought to reach.

The teaching of history, we submit, is not that the exclusive right of authors should by construction be made non-exclusive. It is, rather, that the right should be maintained, for the limited time for which it is granted, as the exclusive right it is said in the Constitution and the statute to be.[21] [See, *American Tob. Co. v. Werckmeister*, 207 U. S. 284, 291, 299 (1907); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127-128 (1932).]

---

[21] History was recognized and given its just due by the Congress in the 1909 revision of the copyright statutes. That is clear from the reports of the House and Senate Committees on Patents which reported out the bill that is now law. [House Rep., No. 2222, 60th Cong., 2d Sess., 6. The Senate report was identical.] Petitioners quote all but one significant sentence of this section of the reports. [Br., 15-16.] Immediately at the end of their quotation the following should be added:

". . . The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly."

II.

Petitioners' Appropriation of Substantial Copyrightable Material for Their Own Commercial Purposes Cannot Be Justified as a Fair Use of Respondents' Copyrighted Dramatic Work.

The exclusive rights conferred by statutory copyright are broad enough and precise enough to proscribe the use of respondents' photoplay which petitioners have made. Those rights include the exclusive right to copy and vend the work; to exhibit, perform or reproduce it in any manner and by any method; and to make any transcription or record of it by which it may be exhibited, performed, presented or reproduced. [17 U. S. C., §1(a)(c)(d).]

The language in which these rights are expressed in the statute reads directly on what petitioners have done. They copied a substantial part of the work; they transcribed or recorded it on motion picture film, with which it can be exhibited, performed and represented; and it is precisely an exhibition and representation of it to the public at large which they propose to make. [R. 83-84.] Not alone a literal reading of the statute but as well its obvious sense compels the conclusion that this conduct was an infringement of respondents' copyright. [*Sheldon v. Metro-Goldwyn Pictures Corp., supra*, 81 F. 2d at 55-56; *Sheldon v. Metro-Goldwyn Pictures Corp.* (2d Cir., 1939), 106 F. 2d 45, 52, *affirmed* 309 U. S. 390; *Universal Pictures Co. v. Harold Lloyd Corp.* (9th Cir., 1947), 162 F. 2d 354, 360-361; *Anschl v. Puritan Phar. Co.* (8th Cir., 1932), 61 F. 2d 131, 137-138, *cert. den.* 287 U. S. 666; *Nutt v. National Institute* (2d Cir., 1929), 31 F. 2d 236, 238.]

As the breadth of the statutory language indicates, the medium in which the appropriated material is used makes no difference. The protection afforded by copyright proscribes copying in any of the "various modes in which matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration. . . ."[22] [*Nutt v. National Institute, supra,* 31 F. 2d at 238; *King Features Syndicate v. Fleischer, supra,* 299 Fed. at 535; *Lawrence v. Dana* (C. C. Mass., 1869), 15 Fed. Cas. (#8136) 26, 59-60. Compare, *Mazer v. Stein, supra,* 347 U. S. at 218.]

The result which was brought about by the application of these principles to the facts here involved cannot be avoided by resort to the so-called doctrine of fair use. The argument that it can, leads to an absurdity. Respondents' rights in the photoplay "Gas Light" include the exclusive right to remake it in any form or version, including, if desired, a comic or burlesque version of it. [*Universal v. Harold Lloyd Corp., supra,* 162 F. 2d at 373-374.] Yet, if petitioners' contention is accepted, that supposedly "exclusive" right—at least as regards a burlesque version—is no different from that of any other member of the public. If petitioners may lawfully do what they did, so may anyone else. Thus, respondents'

---

[22]For example: A cartoon strip may be infringed by a dramatization, notwithstanding that the dramatic imitation "was a mere parody or burlesque of the original, and was so intended" [*Hill v. Whalen & Martell* (S. D. N. Y., 1914), 220 Fed. 359, 360]; a piece of statuary by a lamp base [*Stein v. Mazer* (4 Cir., 1914), 204 F. 2d 472, 477-480, *affirmed* sub. nom. *Mazer v. Stein, supra,* 347 U. S. 201]; a cartoon character by a doll [*King Features Syndicate v. Fleischer, supra,* 299 Fed 533] or by a motion picture dramatization [*National Comics v. Fawcett Publications* (2d Cir., 1951), 191 F. 2d 594, 603]; a novel or a play by a motion picture dramatization. [*Sheldon v. Metro-Goldwyn Picture Corp., supra,* 81 F. 2d at 55-56.]

"exclusive" right would not be exclusive at all. It would be only a privilege shared by the whole world. [See, *Wetherby & Sons v. International Horse etc. Exch.* (1910), 2 Ch. 297, 303.[23]].

An examination of the decisions which have spelled out the so-called doctrine will confirm the foregoing analysis.

A. An Unauthorized Taking of Substantial Copyrightable Material Is Not Fair Use.

First: So-called "fair use" is not an excuse for the appropriation of substantial copyrighted material. No case can be found to support the proposition that "wholesale copying and publication of copyrighted material can ever be fair use . . ." [*Leon v. Pacific Tel. & Tel. Co., supra,* 91 F. 2d 486.] Actually, the term "fair use" is no more than a convenient way of referring to the proposition that copyright is not infringed unless the taking goes substantially beyond the uncopyrightable elements of the work.

The question in any case, Judge Learned Hand has pointed out, "is whether the part so taken is 'substantial,' and therefore not a 'fair use' of the copyrighted work . . ." [*Nichols v. Universal Pictures Corp., supra,* 45 F. 2d at 121]; and, again, ". . . 'copying' might at

[23]In this case the plaintiff's work listed names, pedigrees and other information about a considerable number of race horses. Defendant copied plaintiff's compilation of the names of the horses, adding certain other information about them. In holding this an unfair use, it was pointed out that the plaintiff could have done the same thing; and that to uphold the defendant's contention that he could avail himself of the plaintiff's labors in compiling the list of horses would put the copyright proprietor, in respect of his own work, "in no better position . . . than any other of His Majesty's subjects."

times be a 'fair use'; but it is convenient to define such a use by saying that others may 'copy' the 'theme,' or 'ideas,' or the like, of a work, though not its 'expression.' . . . ." [*Sheldon v. Metro-Goldwyn Pictures Corp., supra,* 81 F. 2d at 54.] One "may copy less than a material part of a copyrighted book, *i.e.*, he may make a fair use of it." [*West Pub. Co. v. Edward Thompson* (E. D. N. Y., 1909), 169 Fed. 833, 861, 862, *modified and affirmed* (2d Cir., 1910), 176 Fed. 833. See, also, *Towle v. Ross* (D. C. Ore., 1940), 32 F. Supp. 125, 127, n. 4; *Warner Bros. Pictures v. Columbia Broadcasting System* (S. D. Cal., 1951), 102 F. Supp. 141, 148-149.]

The English usage is in accord. There, for example, it has been said that ". . . . if the quantity taken be neither substantial nor material, if, as it has been expressed by some Judges, a 'fair use' only be made of the publication, no wrong is done and no action can be brought . . . ."[24] [*Chatterton v. Cave, supra,* 3 App. Cas. at 492.] In short, as one student of the subject has put it, "Much of the doctrine of unfair use, so-called, will, then, appear on examination to be mere aspects, either evidentiary or substantive, of the law of infringe-

---

[24]Perhaps the earliest comment in this regard is that of Lord Eldon in *Wilkins v. Aikin* (1810), 17 Ves. 422, 424, 34 Eng. Rep. 163, 164: "There is no doubt that a man cannot under the pretence of quotation, publish either the whole or part of another's work: though he may use, what is in all cases very difficult to define, fair quotation. . . ." It is plain, not alone from this excerpt but also from the tenor of Lord Eldon's judgment as a whole, that he used "fair quotation" in contrast or opposition to publishing a "part," meaning by the latter, a substantial or material part. [See, in that regard, *Hawkes & Son v. Paramount Film Service, supra* [1934] Ch. at 605-606.]

ment by copying . . ."[25] [Weil, *American Copyright Law* (1917), 439, §1156.]

Notwithstanding that expressions in some of the decisions may seem to import the distinction which petitioners draw, the results reached belie the language used. Whether the case be one of plagiarism in the usual sense, where the test is "substantiality," or one where "fair use" in its supposed narrow and technical sense is at issue, the courts apply the same criteria to determine whether there has been infringement. [See, *e.g., Mathews Conveyer Co. v. Palmer-Bee Co.* (6th Cir., 1943), 135 F. 2d 73, 84-85, where this expressly appears.]

In that regard courts look to one or more of the following: (1) the quantity and quality of the parts taken; (2) the nature and object of the selections made and (3) the degree to which their use may prejudice the demand for or the profits from the original. [*Folsom v. Marsh* (C. C. Mass., 1841), 9 Fed. Cas. (#4901) 342, 348; *Lawrence v. Dana* (C. C. Mass., 1869), 15 Fed. Cas. (#8136) 26, 60; *Story v. Holcombe, supra,* 23 Fed. Cas. (#13497) at 173; *New York Tribune v. Otis & Co.* (S. D. N. Y., 1941), 39 F. Supp. 67, 68; *M. Whitmark & Sons v. Pastime Amuse. Co.* (E. D. S. C., 1924), 298 Fed. 470, 476-477; *Anschl v. Puritan Phar. Co., supra,* 61 F. 2d at 137; *Meccano, Ltd. v. Wagner* (S. D. Ohio, 1916), 234 Fed. 912, 922; *National Institute v. Nutt* (D. C. Conn., 1928), 28 F. 2d 132,

---

[25] Petitioners differentiate that usage from the "doctrine of fair use" strictly so called. [Br. 19n.] We confess to having made a similar differentiation below. Further reflection, sharpened by an attempt to frame a generalization of the doctrine which would fit all the cases, has convinced us that we were wrong. In either context the term denotes no more than that not enough has been taken from the work to constitute infringement, the test of what is enough being the same in both.

135, *affirmed sub nom. Nutt v. National Institute* (2d Cir., 1929), 31 F. 2d 236; *Smith v. Chatto* (1874), 31 L. T. N. S. 775, 776. See, also, the cases cited notes 26, 27, pp. 32, 33, *infra*.]

The "fair use" cases, strictly so-called, bear out this analysis. They do not uphold copying of substantial copyrightable material as a fair use; but they do find a fair use when the part taken is not substantial or material.[26] An early example is *Simms v. Stanton* (C. C. Cal., 1896), 75 Fed. 6, 11, 17, in which it was held that the defendant, having adopted the teaching of plaintiff's work on "physiognomy" (*i.e.*, its uncopyrightable element), but having taken nothing else to any "substantial degree," had made a fair use of the original. The court quoted from Drone's treatise on copyright to the effect that while the copyrighted work could be used "as a guide or instructor" copying therefrom "to a material extent"

---

[26] This proposition is illustrated by the turn which the law in this regard has taken in England. There, the Copyright Act of 1911 provides that the author has the sole right to reproduce the work or any substantial part thereof [1 and 2 Geo. 5, c. 46, sec. 1(2)]; and that infringement consists of doing without consent anything the owner has the sole right to do, but that "Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary" is not infringement. [1 and 2 Geo. 5 c. 46, sec. 2(1), subs. (i).] As a matter of statutory construction the "fair dealing" proviso has been held to change the law so as to permit a substantial appropriation in the cases falling within its scope. [*Johnstone v. Bernard Jones Publics.* [1938] 2 All E. R. 37, 40.] In cases arising before the 1911 Act, and in those arising after its enactment but, because of the purpose for which the appropriation was made, not within the fair dealing proviso, the rule is, as it was before, that a substantial appropriation infringes. [*Hawkes & Son v. Paramount Film Service* [1934] Ch. 593; *Wetherby & Sons v. International Horse, etc., Exch., supra* [1910] 2 Ch. at 305; *H. Blacklock v. C. Arthur Pearson, Ltd.* [1915] 2 Ch. 376, 383; *Campbell v. Scott* (1842), 11 Sim. 31, 38, 59 Eng. Rep. 784, 787; *Lewis v. Fullarton* (1839), 2 Beav. 6, 8-9, 48 Eng. Rep. 1080, 1081. Generally, see, 8 *Halsbury's Laws of England* (3d ed. Lord Simonds, 1954) 433, sec. 786, quoted at pp. 46, 47, *infra*.]

would be piracy. Other illustrative fair use cases in which the result was made to depend on whether substantial copyrightable material had or had not been taken are cited in the margin.[27]

A "substantial" part of a copyrighted work need not be all of it. It is substantial if it is an important part of the work; one which gives it some significant literary or dramatic value. [See, for example: *Universal Pictures Co. v. Harold Lloyd Corp., supra,* 162 F. 2d at 360, holding the taking of one sequence of a motion picture to be substantial because it was "intimately tied into the story, and [was] a main source of comedy for the picture as a whole . . ."; *De Acosta v. Brown, supra,* 146 F. 2d at 410, holding a fictional love interest interpolated into an otherwise factual biography intended for motion picture use, was substantial notwithstanding it was only a small part of the biography, because a love interest was an important part of stories designed for the motion picture public; *Henry Holt & Co. v. Liggett & Myers Tob. Co., supra,* 23 F. Supp. at 303, holding three sentences, about the effect of tobacco on the throat, in a medical treatise, to be substantial because they represented the gist of what was pertinent to that subject in the treatise and were an important part of the tobacco advertisement into which they were copied.]

---

[27] *Toksvig v. Bruce Pub. Co.* (7th Cir., 1950), 181 F. 2d 664, 666-667; *Leon v. Pacific Tel. & Tel. Co., supra,* 91 F. 2d at 486; *De Acosta v. Brown* (2d Cir., 1944), 146 F. 2d 408, 410, *Associated Music Publishers v. Debs Memorial Radio Fund* (2d Cir., 1944), 141 F. 2d 852, 855, *cert. den.* 323 U. S. 766; *Reed v. Holliday* (W. D. Pa., 1884), 19 Fed. 325, 327; *Henry Holt & Co. v. Liggett & Myers Tob. Co.* (E. D. Pa., 1938), 23 F. Supp. 302, 303-304; *Gilmore v. Anderson* (C. C. N. Y., 1889), 38 Fed. 846, 849; *MacMillan Co. v. King* (D. C. Mass., 1914), 223 Fed. 862, 866-867; *Toole v. Ross* (D. C. Ore., 1940), 32 F. Supp. 125, 127; *Farmer v. Elster* (C. C. Mich., 1888), 33 Fed. 494, 495-497.

A fortiori, an appropriation so great that the copy supersedes or becomes a substitute for the original would be substantial. But limits of permissible taking are passed long before that point is reached as the cases cited above sufficiently demonstrate. Petitioners' effort to make the "substitute" test the only criterion [Br. 46-49] simply ignores the course of decision. [See, also, the cases cited at note 34, p. 40, *infra*, which hold that substantial copying infringes even though the copy does not reduce the demand for the original or compete with it.]

Second: In the case at bar it was found that the petitioners copied substantial parts of the copyrightable and copyrighted material in respondents' photoplay. [R. 84.] The finding is not challenged. Copying to that extent is not a fair use, in either of the two senses of the term to which petitioners refer. That finding, therefore, compels affirmance.[28]

---

[28]The finding cannot be said to be "clearly erroneous." [*Adamson v. Gilliland* (1917), 242 U. S. 350, 353; *United States v. Yellow Cab Co.* (1949), 338 U. S. 338, 341-342; *United States v. National Ass'n.* (1950), 339 U. S. 485, 495-496.] Infringement "does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages they take from it that in which its chief value consists. . . ." [*Story v. Holcombe, supra*, 23 Fed. Cas. (#13497) at 173.] Here, petitioners have taken from the photoplay much more than its general theme or ideas. They have taken its major sequences and incidents by which that theme was developed and without which the photoplay would have been nothing. By the same token, without those sequences and incidents the infringing play was nothing. [Appendices "A" and "B," *infra*. See, also, pp. 4, 33, *supra*.] A taking of that sort is substantial, and infringing. [*Universal Pictures Co. v. Harold Lloyd Corp.*, *supra*, 162 F. 2d at 360; *MacDonald v. DuMaurier* (2d Cir., 1944), 144 F. 2d 696, 701; *De Acosta v. Brown*, *supra*, 146 F. 2d at 410; *Sheldon v. Metro-Goldwyn Pictures Corp.*, *supra*, 81 F. 2d at 54-56.]

B. Petitioners' Use of Respondents' Material Was Not for Purposes of Review or Criticism but for the Purpose of Commercial Advertising. Such a Use Is Not Fair.

First: The purpose served by the appropriated parts, in the original or in the copy, will play an important role in the determination of fair or unfair use. [Cases cited, pp. 31-32, *supra*.] That is particularly so in the utilitarian type of works, such as directories, reference works and similar compilations, in respect of which the issue of fair use, in petitioners' sense of that term, most frequently arises.

Works of that sort are written and published to be used more extensively than by a mere reading and an assimilation of their teaching. So long, therefore, as the user keeps fairly within the scope of the use for which such a work was designed, there can be no reasonable ground of complaint.[29] Even then, a use cannot be con-

---

[29]Some illustrative cases: Using a law digest to obtain citations to source material is fair; but *contra*, when a substantial part of the compiler's original text, such as syllabi, commentaries and notes are taken [*West Pub. Co. v. Edw. Thompson Co.*, *supra*, 176 Fed. 833, 838; *Callaghan v. Myers* (1888), 128 U. S. 617, 659-662; using a form of contract from a form book in an actual transaction is fair [*American Inst. of Arch. v. Feinchel* (S. D. N. Y., 1941), 41 F. Supp. 146] but not when copied into another form book [*Brightly v. Littleton* (C. C. Pa., 1888), 37 Fed. 103]; some slight, but not a substantial quotation of dictionary definitions may be a fair use [*Webb v. Powers* (C. C. Mass., 1847), 29 Fed. Cas. (#17323) 511, 516-517]; using a scientific treatise or a compilation to verify one's own research may be fair [*Jarrould v. Houlston* (1857), 3 K. & J. 708, 715-716, 69 Eng. Rep. 1294, 1297-1298; *Kelly v. Morris* (1866), L. R. 1 Eq. 697, 701-702]; but not when the "verification" extends into copying. [*Chapman v. Ferry* (C. C. Ore., 1883), 18 Fed. 539, 542-543.]

Occasionally, a holding of fair use has been explained as based on consent inferred from the nature of the original work. [*Sampson & Murdoch Co. v. Seaver-Radford Co.* (1st Cir.), 140 Fed. 539, 541-542; *Karll v. Curtis Pub. Co.* (E. D. Wis., 1941), 39 F. Supp. 836, 837-838. *Toole v. Ross*, *supra*, 32 F. Supp. at 127.]

sidered fair if the second comer in the field has done little more than "to save time, trouble and expense by availing himself of another's copyrighted work for the sake of making an unearned profit . . . ." [*Conde Nast Publics. v. Vogue School* (S. D. N. Y., 1952), 105 F. Supp. 325, 333; *Leon v. Pacific Tel. & Tel. Co., supra*, 91 F. 2d at 486-487; *Toksvig v. Bruce Pub. Co., supra*, 181 F. 2d at 667; *Walter v. Steinkopff* [1892] 3 Ch. 489, 494-495; *Ager v. Peninsular etc. Navig. Co.* (1884), 26 Ch. D. 637, 642:]. Thus, the purpose for which the appropriation is made will significantly affect the question whether more than is open has been taken—especially when that purpose is to promote the copyist's business.[30]

Second: In the case at bar respondents' work was not utilitarian in nature. It was not designed for any use by others going beyond a view of its public performance. The parts of it which went into petitioners' play made up the essence of the photoplay. They *were* the photoplay, for without them there was no story. There can be no

---

[30] *E. g.*, Quotation in a cigarette advertisement of an excerpt, dealing with the effect of tobacco on the throat, from a medical treatise, was not a fair use, at least when the excerpt, though short, was qualitatively a substantial part of the treatise and of the advertisement. [*Henry Holt & Co. v. Liggett & Myers Tob. Co., supra*, 23 F. Supp. at 303-304]; performance of a part of a musical composition for purpose of building up a listening audience for a radio station is unfair [*Associated Music Publishers v. Debs Memorial Radio Fund, supra*, 141 F. 2d at 853]; reproduction of a newspaper editorial on a presidential candidate would be unfair, if done as publicity for commercial reasons [*New York Tribune v. Otis & Co., supra*, 39 F. Supp. at 687]; copying the essence of a fashion magazine cover into a brochure advertising the copyist's school for models, unfair [*Conde Nast Publics. v. Vogue School, supra*, 101 F. Supp. at 333].

question, therefore, that the copied parts were substantial. [See, note 28, p. 34, *supra*.]

The literary property for the photoplay was acquired and the script of the picture was developed at the cost of a very large expenditure of time and money. [R. 53.] Petitioners saved themselves the expenditure of equivalent cost and effort [R. 70-71] by the simple expedient of taking petitioners' result, condensing it in volume, and adding to it a few perfectly obvious inversions of a comic nature. They did this for their own profit; for the purpose of getting the entertainment or dramatic material they needed to attract an audience to whom the message of Lucky Strike could be delivered. [See, *Associated Music Publishers v. Debs Memorial Radio Fund, supra*, 141 F. 2d at 855.] Decisions of the sort to which reference has already been made, pp. 35-36, *supra*, stamp that kind of use for such a purpose as unfair.

Third: Petitioners seem to appreciate the force of this argument. At any rate, they seek to avoid its effect by the claim that what they did was "criticism." [Br. 22-23, 25-26.] Neither court below put much stock in that contention. The Court of Appeals, indeed, disposed of it almost contemptuously with the remark that the contention "would seem to be a parody upon the meaning of criticism."[31] [R. 283-284.]

---

[31] The point was not specifically mentioned in the opinion of the District Judge. He was, however, fully aware of, and discussed, the privilege of fair comment or criticism. [R. 235-236.] His finding that the use here involved was not fair [R. 85] must, therefore, be taken as a rejection of the contention. [See, *Clyde Equipment Co. v. Adorito* (9th Cir., 1926), 10 F. 2d 106, 107; *Triangle Conduit, etc., Co. v. Fed. Trade Comm.* (7th Cir., 1948), 168 F. 2d

Reasonable quotation for purposes of review or criticism may, of course, be a fair use. [*Hill v. Whalen & Martell, supra,* 220 Fed. at 360; *Story v. Holcombe, supra;* 23 Fed. Cas. (#13497) at 173; *Folsom v. Marsh, supra,* 9 Fed. Cas. (#4901) at 344-345; *N. Y. Tribune v. Otis & Co., supra,* 39 F. Supp. at 68.] But the review or criticism must be a bona fide criticism, intended as such; not merely a cover for a substantial appropriation made to further one's own commercial purposes. The American cases cited above so indicate, and at least one other so holds. [*Sayers v. Spaeth* (S. D. N. Y., 1932), Cop. Off. Bull. No. 20, 625, 626.] The English cases are quite specific on and to this point.[32] [*Campbell v. Scott, supra,* 11 Sim. at 38, 59 Eng. Rep. at 787; *University of London Press v. University Tutorial Press* [1916] 2 Ch. 601, 613-614; *Smith v. Chatto, supra* (1874), 31 L. T. N. S. at 776-777; *Johnstone v. Bernard Jones Publics., supra* [1938] 2 All E. R. at 41, 49-50.[33]]

---

[32]For instance, the excerpt at p. 30, *supra,* from *Chatterton v. Cave, supra,* 3 App. Cas. at 492, to the effect that unsubstantial quotation would be fair use, was directed to the question of the length to which a reviewer of a copyrighted book could go in quoting or reproducing parts of it.

Appropriation for purposes of criticism need not go to the point of superseding the original or being a "substitute" for it before the use becomes unfair. That has been made clear in England since the cases cited by petitioners were decided. [Br. 46-47.] In *Bohn v. Bogue* (1846), 7 L. T. (o. s.) 277, 278, the "substitution" rule of *Roxorth v. Wilkes* (1807), 170 Eng. Rep. 889, was confined to its particular facts, with the comment that "it is perfectly clear . . . [it] can never be the true criterion. . . ." See, also, the quotation from Clarke, pp. 48-49, *infra;* and the cases cited p. 33, *supra.*

[33]Petitioners quote from *Bell v. Whitehead,* 8 L. J. N. S. 141, on this subject. [Br. 25-26.] Immediately at the end, and as part of the paragraph quoted (petitioners indicate no elision), the following should be added:

> ". . . The insertion of such extracts, moreover, tends to extend the sale of the works reviewed. The case before me is also very distinguishable from the case of a work being given

The courts below in the instant case were certainly warranted in finding that petitioners were not engaged in a bona fide review or criticism of "Gas Light" but were engaged in using a substantial part of it for their own profit. The following facts clearly support that finding [*Cf., Walter v. Steinkopff, supra* [1892] 3 Ch. at 495]:

1. The use was a repetitive one, having occurred twice before. [R. 80-82.]

2. It was a use made almost ten years after the work allegedly being reviewed had been produced, exhibited and withdrawn from exhibition in this country. [R. 53-54, 56, 57.]

3. It was a use designed to be an important and necessary part of a program advertising petitioner American's cigarettes. To maintain that campaign—which was not a sporadic affair, but one carried on by television broadcasts at regular intervals—it was necessary to have for each program some form of dramatic or entertainment material. [R. 56-57, 62, 80-82.]

---

in a cheaper form, by a stranger, than the original work costs the proprietor. . . ."

In our case, petitioners present their program to the viewing public free of charge. The usual theatre admission would have to be paid to view respondents' photoplay.

The real ground of decision in *Bell v. Whitehead* was that what we would call an injunction *pendente lite* would be dissolved and the plaintiffs left to their "remedy at the hands of a jury . . ." since "the value of the extract is very minute and trifling" as was the injury to the plaintiffs. This in itself "would be sufficient to induce the Court not to interfere. . . ." [8 L. J. N. S. at 142.] In this regard it may be noted that about that time in England, an injunction *pendente lite* usually ended the litigation in copyright matters; so that unless the plaintiff's right was perfectly clear, Chancery was loath to interfere. [See, *Wittingham v. Wooler* (1817), 2 Swans. 428, 430, 36 Eng. Rep. 679, 680.]

4. Customarily and frequently that material took the form of parody or burlesque of the dramatic and literary works of others. [R. 57-62.]

From these facts the courts below were at the very least entitled to infer that petitioners' purpose was not criticism but advertising; and that any critical flavor inherent in their play was wholly incidental and of no consequence to them. Such an inference was not negated merely because the form of the work was parody. To be sure, parody is frequently an explicit or an implicit criticism of the original. It does not follow that it is always so. Nor does it follow that its critical tone can never be overshadowed by an overriding purpose which has no relation to criticism. [Compare, *Henry Holt & Co. v. Liggett & Myers Tob. Co., supra,* 23 F. Supp. 302 where a quotation from a medical treatise in a cigarette advertisement was held an unfair use.]

C. Petitioners' Use Was Injurious to Respondents. An Injurious Use Cannot Be a Fair Use.

A use of copyrighted material which is injurious to the copyright owner is a substantial and, therefore, an infringing use.[34] The courts have frequently said that an important criterion of fair use is the extent to which

---

[34] A use, even though it does not produce any injury or damage, may nevertheless be unfair. The right of the copyright owner to exclude others is absolute [*Fox Film Corp. v. Doyal, supra,* 286 U. S. at 127], so that it is immaterial that the infringement does not reduce the demand for his work, compete with it, or otherwise injure him. [*Leon v. Pacific Tel. & Tel. Co., supra,* 91 F. 2d at 486-487; *Johns & Johns P. Co. v. Paull, etc., Corp., supra,* 102 F. 2d at 283; *Warren v. White, etc., Mfg. Co.* (S. D. N. Y., 1930), 39 F. 2d 922, 923; *MacMillan Co. v. King, supra,* 223 Fed. at 867-868; *Falk v. Donaldson* (S. D. N. Y., 1893), 57 Fed. 32, 36-37; *Hartford Print. Co. v. Hartford Direct. etc., Co.* (C. C. Conn., 1906), 146 Fed. 332, 335; *Reed v. Holliday, supra,* 19 Fed. at 327; *Wetherby & Sons v. International Horse, etc., Exch., supra* [1910] 2 Ch. at 305.]

the second work may tend to supersede the objects or diminish the profits or value of the original.[35] Conversely, the absence of competition between the two works will some times, but not necessarily, lead to a conclusion that the taking has not been substantial or unfair. [See, *W. H. Anderson Co. v. Baldwin* (6th Cir., 1928), 27 F. 2d 82, 89; *Karll v. Curtis Pub. Co., supra,* 39 F. Supp. at 837; *Sampson & Murdock Co. v. Seaver-Radford Co., supra,* 140 Fed. at 541-542.]

The case at bar is not of the latter class. Injury to the respondents was a plainly inferable fact on the instant record. In the first place, there is the circumstance that the right of the copyright owner to make its own comic or burlesque version of its work was forestalled and the market for such a version pre-empted to a substantial extent by petitioners. [*Cf., Bradbury v. Hotten* (1872), L. R. 8 Ex. 1, 6, 7;[36] *Wetherby & Sons v. International Horse etc. Exch., supra* [1910] 2 Ch. at 305.]

---

[35]*E. g., Mathews Conveyor Co. v. Palmer-Bee Co., supra,* 135 F. 2d at 85; *Universal Pictures Co. v. Harold Lloyd Corp., supra,* 162 F. 2d at 361; *Hill v. Whalen & Martell, supra,* 220 Fed. at 360; *Greene v. Bishop* (C. C. Mass., 1858), 10 Fed. Cas. (#5763) 1128, 1134; *Lawrence v. Dana, supra,* 15 Fed. Cas. (#8136) at 60; *Story v. Holcombe, supra,* 23 Fed. Cas. (#13497) at 173; *Simms v. Stanton, supra,* 75 Fed. at 9-10; *New York Tribune v. Otis & Co., supra,* 39 F. Supp. at 68; *Folsom v. Marsh, supra,* 9 Fed. Cas. (#4901) at 344-345.

[36]In *Bradbury* the defendant in a biography of Napoleon III included several caricatures of Napoleon which had appeared in Punch. They were included in that part of the biography described as "The Story of His Life As Told By Popular Caricaturists." In finding an unfair and, therefore, an infringing, use the Chief Baron (Kelly) and Pigott B. placed considerable emphasis on the fact that Punch itself could have chosen, or it could still choose, to republish its caricatures as part of a history of Napoleon or of his times; so that defendant's use was an injurious invasion of that right, as it could very well tend to cause "many, who would otherwise have bought, to refrain from buying such a work."

There is the further fact that petitioners' use of respondents' material is designed for exhibition over television; and it has been reproduced in a form which makes it adapted to exhibition in motion picture theatres as well. [R. 80-84.] It is common knowledge that television, with its spate of free entertainment conveniently viewable in the home, has made serious inroads upon attendance at motion picture theatres. Thus, there was shown the basis for an inference of actual competition between petitioners and respondent Loew's; and of the existence of potential direct competition in the theatres themselves. No doubt Loew's must suffer competition from television in general, as well as from other entertainment media. But when the competition is sought to be carried on against it by means of its own copyright material, it is stretching language and sense to the point of travesty to call it fair. [*Cf., International News Service v. Associated Press* (1918), 248 U. S. 215, 239-240.]

Finally, in this connection, there could be, potentially, a serious effect on demand for the original, because of the absurd impression of its merit created by petitioners' broad burlesque. Customarily, successful motion pictures, such as "Gas Light," are reissued. [R. 56, 55.] In the several years since its last exhibition in this country, a new motion picture audience has grown up. Having regard to the mass circulation attained by television programs as popular as those of petitioner Benny, it is a fair conclusion that millions of these people would see his burlesque if it were permitted to be exhibited. Many of them might well have a less keen desire to see the original after viewing the burlesque. [*Cf., Hill v. Whalen & Martell, supra*, 220 Fed. at 360, making this very point in respect of a burlesque dramatization of a popular car-

toon strip. See, also, Kitchin, *op. cit.*, xvii, xix, xx, where the harm that parody can do to the original is discussed.]

In all of this there was ample foundation for the inference that petitioners' use of respondents' copyright work was injurious to the latter. When that is so, the use cannot be held fair.

D. A Parody or Burlesque Is No Exception to the General Rule of Unfair Use.

Petitioners defend parody or burlesque as being, in effect, a species of the genus fair use. One would expect, therefore, that decision in any given case would depend upon application of the general principles to which we have referred. That is, in fact, what has happened in the few cases which have dealt with the subject. When there was an appropriation of substantial copyrighted material, the use was held unfair notwithstanding the defense of parody or burlesque. [*Hill v. Whalen & Martell, supra,* 220 Fed. 359; *Green v. Luby* (C. C. N. Y., 1909), 177 Fed. 287.] On the other hand, when the appropriation was unsubstantial or of copyright material which the plaintiff did not own, the opposite result was reached. [*Green v. Minzenheimer* (C. C. N. Y., 1909), 177 Fed. 286; *Bloom v. Hamlin & Nixon* (C. C. Pa., 1903), 125 Fed. 977.[37]]

---

[37]In *Bloom* the gist of the decision is found in this excerpt from the opinion: "... Surely a parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced. No doubt the good faith of such mimicry is an essential element; and, if it appeared that the imitation was a mere attempt to evade the owner's copyright, the singer would be prohibited from doing in a roundabout way what could not be done directly. . . ." [125 Fed. at 978.] In *Minzenheimer* the plaintiff had no proprietary interest in the only copyrighted material involved.

Petitioners pass these cases off as not involving parody or burlesque but only "mimicry" in which the copyrighted material was not textually parodied.[38] [Br. 43-44.] The fact is, however, that in the *Hill* case there was an attempted burlesque of the copyrighted work; and the copying was defended as such.[39] And in *Green v. Luby*, while there was no parodied variation of the text of the copyrighted song, the song was used as a vehicle for a parody or burlseque of the plaintiff's performance of it, with a resulting determination that there had been infringement.

Be that as it may, if petitioners' distinction is a valid one they have distinguished themselves out of the defense upon which they rely. For here, their parody was achieved, not by a variation of the copyrighted text, but by a burlesqued representation of it. The quality of humor or of burlesque in their television play does not arise from such textual changes as they may have made in respondents' material, or in that material itself, as a reading of their script will show. [Appendix "B", *infra*.] It arises from the manner in which that material is performed—from the exaggerations and inversions of mannerisms, postures, stage business, and intonations of voice, introduced into its performance. If, as petitioners argue, exactly that sort of device in the *Luby* case was not parody or burlesque, it was not in the case at bar; and the whole structure of the defense falls to the ground.

---

[38]It seems reasonably plain from the general tenor of the opinions in these cases that the word "mimicry" was used in its ordinary meaning of "ridicule by imitation."

[39]Petitioners say it was as "palpable a steal as could be imagined. . . ." [Br. 44.] Having regard to the finding of substantial copying in the case at bar the same characterization could be made of their use of "Gas Light."

If, on the contrary, such a performance is burlesque, the *reductio ad absurdum* of petitioners' argument is readily perceived. According to them, a burlesque of a copyrighted work would be a fair use regardless of the extent to which the original was followed and reproduced. Suppose, then, that a copyrighted drama were performed in its entirety and exactly as written, line-for-line, scene-for-scene; but with comical exaggerations of mannerisms, postures and the like.[40] In that situation there would be no doubt whatever that an infringing performance or representation of the play had been made. [*Cf.* Br. 49.] And if that is true for such a performance, it must also be true of a performance of less than all but a substantial part of it. The nature and substance of what has been taken, not the manner of its performance, determines infringement.

Petitioners find themselves in no better case with the English decisions to which they refer. [Br. 40-42.] In *Glyn v. Western Features Film Co., Ltd.* [1916] 1 Ch. 261, the comment of Younger, J., about burlesque was not the ground upon which his judgment was made to depend; and it is not generally regarded as stating the law of England on the subject of burlesque. What was actually decided in *Glyn* was, first, that the parts taken from the copyrighted novel were "exceedingly few in number or importance" so that as a "conclusion of fact" there was no infringement ([1916] 1 Ch. at 267-268); and, second, that the novel was so immoral as not to be copyrightable. It is clear, therefore, that the case involved only an unsubstantial taking. That would not have been an infringement even if it had not been burlesqued.

---

[40] Seriously intended dramas of an older vintage are today not infrequently burlesqued in exactly this way.

In any event the comment was clearly dictum, as Judge Younger himself noted by twice remarking that it was unnecessary to the decision. ([1916] 1 Ch. at 268, 269.) And he was wrong in his view of the law which accounted, in his mind, for the absence of any case holding burlesque to be an infringement. ([1916] 1 Ch. at 268.) The law of England in that regard is correctly summarized thus, in 8 *Halsbury's Laws of England* (3d ed. Lord Simonds, 1954), 433, §786:

> "Copyright is a proprietary right, and its infringement is actionable without proof of damage; if, therefore, a substantial part of an author's work is taken, it is not material to inquire whether the user is fair or unfair, or whether the two publications are or are not, likely to enter into competition with one another . . . ." [See, also an additional quotation from this work, p. 47, *infra*.]

The most significant part of the discussion in *Glyn*, however, is the reference to *Hanfstaengl v. Empire Palace* [1894] 3 Ch. 109, and *Francis, Day & Hunter v. Feldman & Co.* [1914] 2 Ch. D. 728, 734. In each of those cases it was held, as a determination of fact, that the copy bore so little resemblance to the original that infringement could not be found; in other words, that a substantial part of the original had not been copied.[41] That is the

[41] Neither of these cases involved burlesque as such; and there is no discussion of the subject in them. *Hanfstaengl* was concerned with a newspaper sketch of some tableaux. The tableaux were live reproductions of some copyrighted paintings. In an earlier litigation it had been held that the tableaux did not infringe the copyright. [*Hanfstaengl v. Empire Palace* [1894] 2 Ch. 1.] The copy therefore was not a copy of the original but of another, non-infringing copy. *Francis, Day & Hunter* involved a claim of copying of the lyrics of a copyrighted song. The question to which the attention of counsel and the court was mainly directed, however, was whether there had been such a publication in England as to secure copyright.

approach in England to the question of burlesque as fair use, as it is in this country. [Authorities cited, pp. 47-49, *infra.*]

Of the decision in *Carlton v. Mortimer,* MacGillivray Copyright Cases, 1917-23, 194, we have only a brief summary; there is no official or verbatim report of the case. That summary, however, as quoted by petitioners [Br. 42] sufficiently shows that, burlesque or no, the judgment was grounded upon the unsubstantiality of the taking of "two trifling incidents . . . ."[42] The case, therefore, fits into our view that whether copying by way of burlesque will infringe depends on the qualitative nature of the appropriation. It fits in too with the views of English commentators who have discussed the problem. For example:

> ". . . . Younger, J.'s view [in *Glyn*] was not the basis of his judgment. It would appear that at any rate since the commencement of the Copyright Act, 1911 (1 and 2 Geo. 5, c. 46), whereby reproduction in any material form was made an infringement of copyright there can be no justification for a user of copyright material based upon a supposed right to abridge or burlesque. A burlesque may, of course, be no infringement because it does not reproduce any of the incidents of the play burlesqued, but only the plot in which there is no copyright . . . ."
>
> 8 *Halsbury's Laws of England* (3d ed. Lord Simonds, 1954), 433, §786, note (*d*).

"It is thought that the question whether abridgments [etc.] infringe copyright must now depend

---

[42]The defendant had for years performed an original comic acrobatic skit. After the publication of "Tarzan and the Apes" he inserted two incidents, described in the report as "trifling," which were similar to two in the novel.

upon the answer in each case to the question whether the production has involved a substantial use of copyrighted material or only ideas and information.

* * * * * * * *

"Similar considerations seem to arise whether a burlesque can be an infringement. If the burlesque consists of what is, in substance, a new work parodying an existing one but not making substantial use of its language or incidents, it is submitted there is no infringement. But a work which slavishly used the plot and incidents of another would not be defensible under the cloak of burlesque."

Copinger & Skone James, *Law of Copyright* (8th ed., 1948), 129, 131-132.

"The Court held [in *Carlton v. Mortimer, supra.* p. 47] that these two incidents did not constitute a substantial part of the novel, especially in view of the fact that whereas the incidents in the novel were serious in nature, in the skit they were treated entirely as burlesque. This case raises the question of whether a burlesque can infringe a serious work. It is submitted that it may be an infringement, the material question for consideration being whether a 'substantial part' of the copyright work is or is not reproduced.

* * * * * * * *

". . . the decision [in cases of quotation for purposes of criticism] would depend it is thought, upon the nature of the publication, *i.e.*, upon whether the object of the newspaper was genuinely to criticize the works, or whether under guise of criticism the real object was unfairly to derive profit from the reproductions as such. Whether a burlesque could constitute a fair dealing for the purposes of criticism cannot be answered in the abstract, but must also,

it is thought, depend upon similar principles applied to the particular case."

Clarke, *Copyright & Industrial Design* (1951), 63, 83.

The American commentators cited by petitioners [Pet. 45-46] are readily disposed of. The quotation from 13 C. J. 1113, 1118, is based entirely on the *Glyn* case. [See, pp. 45-47, *supra.*] In the revised edition the quoted statement seems to have been dropped, since it does not appear in the corresponding sections of the work. [18 C. J. S. 215, 219, §94a, c(3).] Weil's comment is based on *Hill v. Whalen & Martel, supra,* 220 Fed. 359 which, as we know, held a burlesque to be an infringement; and on the *Bloom* case which involved only an unsubstantial taking. [See, pp. 43-44, *supra.*] Lindley hardly helps petitioners, since he recognizes that parody may infringe. He cites no authority for any of his statements. Spring, too, recognizes that burlesque may infringe; and indicates that the test is the ordinary "fair use" test to which we have referred at pages 31-32, *supra.* The basis for DeWolfe's comment is uncertain. He cites no authority. It is obvious, however, that his dogmatic assertion goes beyond anything which has been decided on this subject.

The upshot of all this discussion can be shortly stated. Neither in England nor in this country has an appropriation of substantial copyrighted material been deemed a fair or non-infringing use. Nor, in either country, has parody or burlesque been treated as an exception to that doctrine.

III.

A Custom to Burlesque, Even if Shown to Have Existed in the Breadth Claimed, Cannot Change the Legal Effect of the Copyright Act or the Rules of Law Applicable to the Case.

Petitioners' recourse to custom as justification of their infringement is not a new tactic in this field. The short answer to contentions of that sort was given in England quite a few years ago, when, even then, they were not new:

> ". . . The plea of the existence of such custom, or habit, or practice of copying as is set up can no more be supported when challenged than the highwayman's plea of the custom of *Hounslow Heath*. It has often been relied upon as a defense in such cases, but always has been repudiated by the Courts . . ."[48]

Walter v. Steinkopff, supra [1892] 3 Ch. at 499.

Actually, the argument is irrelevant here. If the taking of substantial copyrighted material by way of parody is not a violation of the exclusive rights secured by statutory copyright there is no need to resort to the alleged custom. If, but for the practice, it would be a violation, that rule of positive law remains unaffected by the custom. "The beliefs of individuals or of a group or of a community that a rule of law is something different from what it actually

---

[48]The action was for infringement of the copyright of the London Times (a morning paper) in a letter from Rudyard Kipling, which had been copied by the Gazette (an afternoon paper). The custom relied on, alleged, and assumed by the court, to have been acquiesced in and followed by the Times, was for papers to copy from each other when there was no competition between them and the source was acknowledged.

is, will not change the rule of law . . ."[44] [3 Williston, *Contracts* (rev. ed.), 1879, §651. See, also: *United States v. Pine River Logging etc. Co.*, 8 Cir., 89 Fed. 907, 915-916; *United States v. Dodson*, S. D. Cal., 268 Fed. 397, 406-407; *Avedon v. Exstein*, S. D. N. Y., 141 F. Supp. 278, 279-280.]

Even if that were not so, it would at least have to appear that the asserted custom was universally acquiesced in and that it was as broad as the conduct it is supposed to justify. Nothing of the sort appears in the instant record. Before it could be said to appear, we would have to know that parodies generally included appropriations of substantial material which was protected by copyright law at the time [see, note 7, p. 14, *supra*]; that the practice of taking it was generally acquiesced in; and that permission to take it was not gotten or thought to be necessary.[45]

The argument that "if Congress had intended that authors should be protected from having their works burlesqued or parodied" it would have so provided [Br. 50], simply ignores the whole plan and arrangement of the copyright statute. By that act the rights secured to authors were made exclusive—not merely exclusive of everyone save parodists, but *exclusive*. To give the parodist the extraordinary and preferential treatment which is

---

[44]Of course, two individuals may contract in contemplation of a custom or usage, and to that extent change the application of a rule of law to that transaction. [Williston, *op. and loc. cit.*] But that is not what is or could be claimed at bar.

[45]The record here shows that even petitioner Benny obtained permission from the copyright owner for some of his parodies [R. 58-59, 61-62]; and it does not show that such permission was not gotten for the others. Historically there have been other instances. [Kitchin, *op. cit.* xviii, 213.]

claimed for him by petitioners, an express exception to that all embracing mandate would have to be found. [See, pp. 15-17, *supra*.]

Conclusion.

Nothing in the decision below places any obstacle in the way of the continued exercise of the true parodist's art. He still has, to the same extent as all other authors, "the full scope of a fair use." To be sure, he does not have, any more than has any other author, the lawful right to an unfair use. And most certainly he does not have the right to take another's property in order that he may be better able to sell cigarettes.

The judgment below should be affirmed.

Respectfully submitted,

JOSEPH P. LOEB,
HERMAN F. SELVIN,
Attorneys for Respondents.

LOEB AND LOEB,
Of Counsel.

APPENDIX "A."

Petitioners' Television Play (2d Ed) With Material Taken From Respondents' Photoplay Deleted.

DON

. . . Yes, ladies and gentlemen, tonight the Lucky Strike Players will bring you a great psychological drama. . . . "Autolight" . . . starring Barbara Stanwyck and Jack Benny. . . .

(MUSIC.)

(AS CURTAIN OPENS, WE DISCOVER THE MAID DUSTING SOME SMALL ARTICLES ON THE MANTELPIECE.)

* * * * * * * *

(THE 1ST MAID TURNS AND SEES THE MAID ARRANGING THE TRAY ON THE TABLE.)

(MUSIC OUT.)

* * * * * * * *

MAID

The master said she ordered this for dinner.

1ST MAID

What is it?

MAID

Marinated Salami.

* * * * * * * *

1ST MAID

(LOOKING OFF.)

Sssshh . . . here she comes now. If you need me, I'll be in the pantry.

(1ST MAID EXITS AND THE MAID BUSIES HERSELF WITH THE TRAY.)

(BARBARA STANWYCK ENTERS AS MRS. MANNINGHAM.)

(APPLAUSE.)

BARBARA

Elizabeth . . . Elizabeth, I've changed my mind. I don't think I'll eat anything.

MAID

Why, Madame, don't you feel well?

* * * * * * * *

MAID

Madame, perhaps if you ate something you would feel better.

BARBARA

Yes, yes, perhaps you're right.

(SHE GOES OVER AND SITS AT TABLE.)

MAID

I know you'll enjoy your supper. It's exactly what your husband said you ordered.

BARBARA

(POINTING TO A DISH ON THE TRAY.)

What's that?

MAID

Marinated Salami.

BARBARA

Marinated Salami?

MAID

Yes, ma'am.

(PICKING UP THE TEA POT.)

Shall I pour the sour cream?

BARBARA

(JUMPING UP.)

No, no, don't pour anything. . . . Where's my husband? Why isn't he here when I need him?

SOUND (OFF) DOOR SLAMS.

MAID

Madame, I think the master just came in.

(MUSIC.)

BARBARA

Oh, good, good. Elizabeth, you may go.

(MAID EXITS. . . . BARBARA GOES TO COUCH, STANDS WITH BACK TO AUDIENCE. . . . JACK ENTERS, DRESSED IN THE PERIOD OF THE DAY, AND STANDS WITH AN OVERLY DIGNIFIED AND LOFTY AIR.)

BARBARA

Oh Charles, Charles, my husband . . . I'm so glad you're home.

(JACK CALMLY TAKES OFF HIS HAT AND PLACES IT AND COAT ON RACK, GOES OVER TO FIREPLACE.)

* * * * * * * *

BARBARA

I had to come out, Charles. It was those headaches again . . . . those awful headaches. I've been confined to my room all day . . . breakfast in bed, lunch in bed . . . I couldn't have dinner in bed, it was full of dirty dishes.

(SHE THROWS HERSELF ON THE COUCH.)

* * * * * * * *

(JACK TURNS, PULLS THE BELL CORD, AND LOOSE PLASTER FALLS FROM THE CEILING.)

* * * * * * * *

JACK

(TURNING TO ROCHESTER.)

You may go, Jeeves.

ROCHESTER

Thank you, sir. . . . May I have tomorrow off?

JACK

Tomorrow off? Why?

ROCHESTER

The cricket matches, you know.

JACK

Oh yes, yes.

ROCHESTER

Thanks, boss.

JACK

What?

ROCHESTER

Righto, Governor.

(ROCHESTER EXITS . . . BARBARA TURNS TOWARD JACK.)

* * * * * * * *

BARBARA

Wait, Charles, wait . . . Before you go, kiss me.

JACK

Very well.

(JACK GIVES BARBARA A BIG KISS.)

JACK

How was that, Bella?

BARBARA

One dimension.

(JACK LOOKS AT AUDIENCE, MAD, AND WALKS OFF.)

* * * * * * * *

(BARBARA GOES OVER TO UMBRELLA STAND, TAKES OUT AN UMBRELLA, OPENS IT UP, STEPS BACK TO THE BELL CORD, PULLS IT, AND IS DELUGED BY A DOWNPOUR OF PLASTER.)

BARBARA

Why does he leave me like this? Why? Why?

(WE SEE THE DARK FIGURE OF A MAN ENTER THE ROOM.)

BARBARA

Oh, Charles.

(SHE THROWS HER ARMS AROUND HIM AND KISSES HIM FERVENTLY.)

BARBARA

Don't ever leave me again, Charles.

(KISSES HIM AGAIN.)

Oh Charles, Charles, let me hold you closer.

(KISSES HIM AGAIN.)

Charles . . . Wait a minute . . . who are you?

BOB

If I told you I'm anybody else but Charles, I'd be crazy.

* * * * * * * *

BARBARA

Inspector, how do you know so much about this house?

BOB

I built it.

BARBARA

What?

BOB

If your husband ever asks you where Little Rock is, say Idaho.

BARBARA

I don't know what you're talking about . . . Anyway, Inspector, what are you going to do to my husband?

* * * * * * * *

(BOB GOES TO A CLOSET AT THE OTHER END OF THE WALL, OPENS IT, GOES IN, AND CLOSES THE DOOR AFTER HIM.)

BARBARA

(TO HERSELF.)

He may have to be in there for a long time. I better give him something to eat.

(SHE PICKS UP PLATE OFF THE TABLE, STEPS OVER TO THE CLOSET DOOR AND KNOCKS.)

Inspector . . . Inspector . . .

(THE OTHER CLOSET DOOR OPENS AND BOB STICKS HIS HEAD OUT.)

BOB

Did you call me?

BARBARA

Yes, I—

(TURNING.)

Wait a minute, you were in this closet.

(SHE GOES OVER TO BOB'S CLOSET.)

* * * * * * * *

BARBARA

Thank goodness. Here, in case you get hungry.

BOB

(POINTING TO TRAY.)

What is that?

BARBARA

Marinated Salami.

BOB

Oh, jolly good!

(SOUND: OFF STAGE WE HEAR THE DOOR OPENING AND CLOSING.)

BARBARA

My husband—he's coming back!

(SHE SLAMS THE CLOSET DOOR AND GOES TO SIT DOWN.)

(JACK ENTERS.)

JACK

(POINTING TO FLOOR.)

Bella, how can you be so careless as to leave this napkin on the floor?

BARBARA

I'll put it in the closet.

JACK

No, I'll do it. I'll put it in the closet.

(HE PICKS UP NAPKIN AND STARTS FOR THE CLOSET WHERE WE LAST SAW BOB AND IS ABOUT TO OPEN THE DOOR.)

BARBARA

No, no, Charles, not that closet.

JACK

Huh?

BARBARA

(POINTING TO OTHER CLOSET.)

That is the linen closet.

JACK

Very well. Oh, incidentally, Bella, I ran into Dr. Pepper today and while we were having a coke, he said—

(JACK GOES TO THE OTHER CLOSET, BOB OPENS DOOR, UNCEREMONIOUSLY SNATCHES THE NAPKIN OUT OF JACK'S HAND AND SLAMS THE DOOR SHUT. JACK STANDS LOOKING AT THE DOOR SLIGHTLY BEWILDERED.)

BARBARA

Charles, did you put the napkin in the closet?

JACK

I didn't have to, the closet reached out and grabbed it.

* * * * * * * * *

(JACK REACHES FOR THE BELL CORD AND AS HE IS ABOUT TO PULL IT, HE SUDDENLY STOPS . . . STEPS OVER TO THE ARCHWAY AND CALLS—)

Jeeves!

BARBARA

Coward

JACK

Jeeves, pack madame's bag! But before you do, bring me a brandy.

ROCHESTER

(OFF)

Yes, sir!

* * * * * * * *

(THE BUTLER ENTERS WALKING ON HIS HANDS AND BALANCING A TRAY ON HIS FEET . . . JACK CALMLY REACHES FOR THE BRANDY GLASS ON THE TRAY. HE PICKS UP THE GLASS, GULPS DOWN THE DRINK, REPLACES IT ON THE TRAY, AND THE BUTLER EXITS ON HIS HANDS.)

BARBARA

Fingerprints?

BOB

Yes.

BARBARA

The ones on the rug belong to the butler.

BOB

(TO JACK.)

Come along now.

* * * * * * * *

(SHE GOES TO THE BELL ROPE AND PULLS IT . . . BOB COMES IN AS PLASTER AND BRICKS FALL FROM THE CEILING ALL OVER EVERYTHING.)

(MUSIC AND APPLAUSE.)

APPENDIX "B."

Petitioners' Television Play (2d Ed.) With Material Supplied by Them Deleted.

. . . we're going to do the play I was talking about. Barbara Stanwyck and I will present a satire of M.G.M.'s great classic, "Gaslight." . . .

* * * * * * * *

DON

The scene is the living room on the first floor of a four-story house in a gloomy and unfashionable quarter of London in the year 1871.

(A MAID ENTERS WITH A TRAY AND PLACES IT ON THE TABLE.)

DON

Outwardly the atmosphere is one of peace, for even the servants are unaware that for the past weeks the master of the house has been systematically pursuing a sinister, diabolical scheme to drive his wife insane.

* * * * * * * *

1ST MAID

I thought the master wanted Mrs. Manningham to have supper in her room.

MAID

(SLIGHT ENGLISH ACCENT.)

He did, but she insists on eating in here . . . and if you ask me, I think she's off her trolley.

* * * * * * * *

1ST MAID

She's an odd one, all right.

MAID

The master says if she gets any worse, he's going to send her away to a—

BARBARA

It is these headaches, the frightful headaches . . . . . and my husband tells me I keep doing things I don't even remember. I can't sleep at night . . .

* * * * * * * *

I'm going mad, I tell you . . . These headaches, these awful headaches, I don't even remember ordering anything like that . . .

* * * * * * * *

(JACK ENTERS, DRESSED IN THE PERIOD OF THE DAY, AND STANDS WITH AN OVERLY DIGNIFIED AND LOFTY AIR.)

* * * * * * * *

BARBARA

The hours that you're away drag on and on. I can't live without you by my side. I need your sympathy . . . your help . . . your tender understanding.

(JACK WITH MEASURED NONCHALANCE, REMOVES HIS GLOVES, FINGER BY FINGER.)

BARBARA

Oh, my darling . . . my beloved . . . only you can guide me through the darkness of my confusion. Only you can make me smile again, laugh again, live again . . . Charles . . . Charles . . . speak to me . . . speak to me!

JACK

(WITH ARROGANT COLDNESS.)

What are you doing out of your room?

(TURNING.)

Answer me, Bella . . . What are you doing out of your room?

BARBARA

I had to come out, Charles. It was those headaches again . . . Those awful headaches . . . it was driving me mad . . . . .

* * * * * * * *

(SHE THROWS HERSELF ON THE COUCH.)

JACK

Now, now, Bella, control yourself. Now now, you're getting hysterical . . . What you need is a sedative. I'll ring for the maid.

* * * * * * * *

JACK

* * * * * * * *

Bella, while you're waiting for a sedative, why don't you just relax?

BARBARA

Yes, Charles.

JACK

Now just close your eyes and forget everything.

BARBARA

Yes, Charles.

(JACK RUSHES OVER AND TURNS A PICTURE OF WASHINGTON CROSSING THE DELAWARE UPSIDE DOWN . . . THEN GOES BACK TO LEFT OF BARBARA.)

JACK

Do you feel better now, Bella?

BARBARA

(OPENING HER EYES.)

Yes, Charles, yes.

JACK

(LOOKING AT PICTURE.)

I knew if you just sat down for a minute and relaxed, you'd feel so much . . . so much . . .

BARBARA

Charles . . . what are you staring at?

JACK

That picture . . . . that picture on the wall. Why did you turn it upside down?

BARBARA

Picture . . . upside . . . .

(TURNS, LOOKS AT PICTURE . . . . THEN BACK TO JACK.)

But I didn't . . . I didn't turn that picture upside down. It must have been someone else.

(BURIES FACE IN HANDS, CRYING.)

Oh, Charles, what's happening to me . . . what's happening to me?

* * * * * * * *

JACK

Bella . . . the other picture is upside down, too. Look!

BARBARA

No! No!

JACK

Why do you keep doing these things?

BARBARA

But I didn't! I didn't.

JACK

(BENDING OVER BARBARA.)

Bella, Bella, your mind is failing. Why don't you let me send you away? You turned the picture upside down and don't even remember.

BARBARA

(GETTING UP.)

But I didn't do it, Charles. . . . It must have been someone else.

(GOES TO FIREPLACE.)

JACK

Someone else . . . always someone else. Bella, are you suggesting that one of the maids or the butler did it?

BARBARA

(GROPING.)

Yes, yes. . . . That's it, the butler, he must have done it.

JACK

Very well, I'll find out.

(JACK STARTS FOR THE BELL CORD . . . BARBARA TAKES A STEP TOWARD JACK.)

BARBARA

Charles, don't humiliate me in front of the servants, please.

(SITS DOWN ON COUCH.)

JACK

It's the only way, Bella. I must ring for the butler.

BARBARA

Oh, Charles, if the butler didn't turn the pictures upside down, perhaps I did it, but I don't remember.

* * * * * * * *

JACK

Hmm . . . what's keeping that butler?

(CALLING.)

Jeeves . . . . Jeeves.

(ROCHESTER ENTERS.)

ROCHESTER

Cherrio. Did you ring, sir?

JACK

Yes, Jeeves . . . The pictures on the wall are upside down if you noticed it.

(POINTING TO PICTURES.)

ROCHESTER

(LOOKING AT PICTURES.)

Well, by Jove, if they ain't!

JACK

Did you do it?

ROCHESTER

Who, me?

BARBARA

Yes, Jeeves, maybe you turned them upside down when you were dusting.

* * * * * * * *

ROCHESTER

Oh, your lordship, come now!

JACK

Then I can assume that you did not turn the pictures upside down.

* * * * * * * *

(TURNING TO BARBARA.)

Did you hear that, Bella? It was you who did it.

BARBARA

But, Charles, I don't remember, I don't remember.

JACK

Don't remember . . . don't remember . . . You've been doing everything backwards . . .

* * * * * * * *

Bella, you're all mixed up. . . . Why don't you admit it . . .? Why don't you let me take care of you? Why don't you let me take care of you?

* * * * * * * *

Bella, your mind is failing and you might as well admit it.

(TURNING TO ROCHESTER.)

You may go, Jeeves.

* * * * * * * *

(ROCHESTER EXITS . . . BARBARA TURNS TOWARD JACK.)

JACK

Bella, I'm sure that now you realize you are mentally ill.

(JACK TURNS AND PICKS UP HIS HAT, CAPE, CANE, ETC.)

BARBARA

(GOING TO STAIRWAY.)

Charles . . . . Charles . . . where are you going?

JACK

I have an appointment.

BARBARA

Every night . . . every night you leave me alone . . .

* * * * * * * *

(JACK LOOKS AT AUDIENCE, MAD, AND WALKS OFF.)

BARBARA

(STARTS AFTER JACK, STOPS, TURNS BACK.)

Every night he leaves me alone. I can't stand it any longer.

These headaches, these awful headaches. I must have someone to talk to.

(CALLS.)

Elizabeth . . . Elizabeth . . . Where is that maid?

(THE LIGHTS FLICKER AND GO DIM.)

BARBARA

The lights . . . the gas lights are going dim again . . . the same as they did last night and the night before. Every time he leaves me, they go dim. Oh, why does he do this to me? If only he knew how much I love him, he'd stay here and comfort me through my hours of—

(SOUND: DOOR OPEN AND CLOSE OFF SCENE.)

BARBARA

The front door. . . . He's come back. He's come back!

(WE SEE THE DARK FIGURE OF A MAN ENTER THE ROOM.)

* * * * * * * *

BARBARA

(STEPPING BACK.)

What do you want?

BOB

I want to see you. I'm an inspector from Scotland Yard. I've come to talk to you about your husband.

BARBARA

Oh, my poor Charles . . . is he in danger?

BOB

No, but you are.

BARBARA

Me?

BOB

Yes. . . . You see, your husband is a notorious jewel thief. Fifteen years ago he murdered a woman who lived in this mansion. Then he married you so that under the guise of an English gentleman he could buy the place and search for her hidden jewels.

BARBARA

No, Inspector!

* * * * * * * *

BOB

Now as I was saying . . . Your husband is trying to drive you out of your mind so that he can send you away and then he can continue his search in the attic.

BARBARA

(GETTING UP.)

That's why the lights go dim down here. He turns the gas on in the attic.

BOB

Yes . . . then he has a secret door through which he can return to the living room and act as though nothing has happened.

* * * * * * * *

(THE LIGHTS NOW FLICKER AND GET BRIGHT AGAIN.)

(MUSIC.)

BARBARA

The lights . . . the gas lights are up again. That means my husband is coming back. . . . Quick, quick . . . get in the closet.

(BARBARA GOES TO TABLE.)

(BOB GOES TO A CLOSET AT THE OTHER END OF THE WALL, OPENS IT, GOES IN, AND CLOSES THE DOOR AFTER HIM.)

* * * * * * * *

JACK

Well, Bella, are you feeling better now?

BARBARA

Yes, Charles, my headache is all gone.

JACK

Oh.

* * * * * * * *

BARBARA

(WITH BACK TO JACK.)

Charle you're talking crazy.

JACK

No, no, Bella, you're the one who's crazy. You keep going around the house turning things upside down . . . and then you say you don't remember.

(TURNS BARBARA AROUND.)

Admit it yourself, Bella, you're losing your mind. Let me send you away. I'll have the butler pack your bag.

* * * * * * * *

ROCHESTER

(OFF)

Yes, sir!

JACK

(HE GOES BACK TO BARBARA.)

I must send you away, Bella. This evening you turned the pictures upside down. Yesterday you turned the chair upside down, the desk upside down, the table up-

side down, you kept going all around the house turning everything upside down.

* * * * * * * *

JACK

(WITH VILLAINOUS EXPECTANCY.)

Bella . . . Bella . . . didn't you notice anything different about the butler?

BARBARA

Yes, Charles, and I found out something different about you, too.

JACK

What?

BARBARA

Your game is up . . . Your scheme didn't work . . . I know who you are . . . . and what you are . . . and I know what you've been trying to do to me.

JACK

Oh, you do, eh? . . . then my dear Bella, the time is over for subtleties.

(JACK MAKES A LUNGE FOR BARBARA, FASTENS HIS FINGERS ABOUT HER THROAT AND BENDS HER OVER A CHAIR. THE CLOSET DOOR OPENS AND BOB STEPS INTO THE ROOM . . .)

BARBARA

Inspector, help me . . . . please!

BOB

What? . . . Oh, yes, yes.

(HE TOSSES THE PLATE ASIDE AND QUICKLY SUBDUES JACK.)

Unhand that woman. Mr. Manningham, I place you under arrest. Lady Bella, I shall take him to the police station and then I'll come back and search the house for fingerprints.

* * * * * * * *

BARBARA

(GETTING UP.)

Wait, before you take him away, I'd like to talk to my husband alone.

(TURNS BACK TO JACK.)

BOB

Alone. Then I better tie him to this chair.

(BOB SETS JACK IN THE CHAIR AND TIES HIS HANDS BEHIND HIM WITH THE NAPKIN.)

BOB

(To BARBARA.)

I'll be in the kitchen, if you need me.

(BOB EXITS.)

JACK

That was very clever of you, Bella, the way he fell for it.

BARBARA

What?

JACK

I'm Charles, your husband, and you love me . . . do you hear, you love me. Go, Bella, go over to that table. There's a knife there. Get it and cut me loose.

BARBARA

(CRAZILY)

Yes, yes, the knife . . . the knife.

(SHE GOES TO THE DESK, GETS THE KNIFE, STEPS BACK TO JACK, AND STANDS LOOKING AT HIM DELIBERATING.)

JACK

That's it, Bella . . . Bella, why are you standing there? . . . Cut me loose . . . Cut me loose . . . Bella, aren't you going to cut me loose?

BARBARA

(VERY DRAMATIC AND MENACING.)

Yes, Charles, I'm going to cut you *very* loose.

JACK

Bella! Bella . . . Bella . . . what are you going to do? . . . . I'm your husband. I'm Charles.

BARBARA

(KNEELING BY JACK.)

Yes, Charles, you're my husband . . . and you tried to make me believe that I was crazy. . . . Well, maybe I am.

(PUTTING THE KNIFE TO HIS THROAT.)

Maybe I am . . . But it was you who drove me to it . . . It was you who turned the pictures upside down . . . It was you who turned the lamp upside down and almost convinced me that I did it . . . Then you turned the table upside down . . . the desk upside down . . .

* * * * * * * *

JACK

Bella!

* * * * * * * *

JACK

Bella, don't kill me . . . don't kill me!

BARBARA

No, I won't kill you. That's too good for you. I'm going to let them take you away . . . INSPECTOR.

* * * * * * * *

. . . . INSPECTOR . . .

(MUSIC AND APPLAUSE.)

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A. D. 1957.

9-17-57—65